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*Thomas Smith*

1745-1809

From the only known portrait, a miniature  
in possession of W. J. De Renne, Esq.,  
Wormsloe, Savannah, Georgia  
(Artist unknown)



# The Life and Times of Thomas Smith 1745-1809

A Pennsylvania Member of the Continental Congress

BY

BURTON ALVA KONKLE

FORMERLY ASSOCIATED WITH THE

Historical Work of the Pennsylvania Bar Association, Member of  
the Pennsylvania Historical Society and of the  
American Historical Association

WITH AN INTRODUCTION BY THE

HON. HAMPTON L. CARSON, LL.D.

Attorney-General of Pennsylvania

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TO  
MY LITTLE DAUGHTER  
WINIFRED





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## Preface

During the past few years, while associated with the Hon. Hampton L. Carson, in the collection of material for his "History of the Supreme Court of Pennsylvania," and with the historical work of the Pennsylvania State Bar Association, the author became especially interested in certain of the remarkable, but all too little known, judges and lawyers of the past in this commonwealth, and the movements with which they were identified. Among these, not to mention more, were Chief Justices David Lloyd and John Kinsey and Justices George Bryan and Thomas Smith—men vastly different in character and achievement, but worthy of the closest attention of every student of the growth of the great commonwealth of Pennsylvania, and, indeed, of students of national history itself. It had been one of the duties of the author to urge upon the proper persons the collection, preservation and publication of material regarding the life and work of those eminent in legal life, and many took occasion to reciprocate and urge the author to do it himself. In regard to the characters above mentioned, it had long been the hope that the way might some time be clear to permit him to make these great characters appear to the public as he saw them in the original records. The location of portraits of the Revolutionary leader in this commonwealth, George Bryan, and that of Judge Thomas Smith, as well as the finding of their original papers, and the fact that these two careers were so closely bound up with that most interesting and historically significant thirteen-years-long contest over the Pennsylvania Constitution of 1776—the prototype of constitutions of the school opposed to checks and balances—soon led the author to decide that when the way opened, as it did in the summer of 1902, he should undertake the story. Furthermore, the character and career of Judge Thomas Smith had had peculiar attractiveness, not only because of the noble qualities of the former, but also because the latter was so capable of

illustrating the constructive spirit in the growth of both state and nation during probably the most interesting half-century of their existence. This has also involved treatment of the work of George Bryan, who, extended as this treatment of him is, deserves, and will yet receive from some hand, a proper tribute which will place him among the men Americans, and lovers of liberty everywhere, delight to honor.

As to method, the author has attempted nothing but to introduce the reader at once to the original sources from which his own impressions were received. This has necessitated the utmost loyalty to those originals, even to a punctuation and spelling often unknown to our own day—and, sometimes, to any other. This loyalty to originals has also been sought in illustration, and much of it has been made possible through the excellent photographic work of Mr. Charles Truscott, of Philadelphia.

To acknowledge the many courtesies received in such a work as this is a hopeless task and cannot be attempted. It is impossible, however, not to in some slight manner recognize the encouragement and friendship of W. J. De Renne, Esq., of Savannah, who has so freely placed at my disposal the Smith papers in his collection and so thoroughly sympathized with my historical purposes throughout the long work. Nor can I omit the name of that valued friend, Hon. Hampton L. Carson, who kindly writes the Introduction, whom, it is patent to all, to know is to love. I must also acknowledge the courtesy of D. McNaughton Stauffer, Esq., of New York; C. P. Humrich, Esq., of Carlisle; Eli Kirk Price, Esq., of Philadelphia; Thomas H. Montgomery, Esq., of West Chester;<sup>1</sup> Mrs. Chew, of Germantown; Hon. W. F.

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<sup>1</sup>From Mr. Montgomery has been just received a confidential letter from Thomas Smith to James Wilson on the Carlisle riots. The following extract only can here be quoted: "Those who went so willingly and unnecessarily to gaol, are only the Tools of Tools—I verily believe that they and those here who immediately urged them on, wished and expected to foment a civil war——happily their attempts as well as the machinations of those at the bottom of this wickedness have proved abortive on this occasion, and will, I hope, be brought to naught ultimately. I must however do many respectable characters, whose minds were for some time greatly adverse to that Constitution [the national one], which most of the wisest and best men on the continent so highly approve of, the justice to observe that they seemed upon this occasion as anxious to preserve peace and good order as any others." This letter was the basis of the accounts in the Philadelphia papers.

Bryan, of Peoria; S. S. Bryan, Esq., of Titusville; Dr. Alfred Whelen and Simon Gratz, Esq., of Philadelphia, and Mrs. Charles Hodge Scott, of Germantown, while using their collections. My friend, William MacLean, Jr., Esq., of Philadelphia, has been suggestive in the borderland of legal lore involved in a layman's work on a judicial life, and like aid in another sphere from another friend, the well-known artist, Mr. Albert Rosenthal, of Philadelphia, is gladly acknowledged. Material has been kindly sent me by Rev. J. Strachan, of Port Erroll, Scotland; William A. Kelker, Esq., and H. M. Hoke, Esq., of Harrisburg; Boyd Crumrine, Esq., of Washington; Dr. John H. Brinton and his son, Jasper Yeates Brinton, Esq., of Philadelphia; John S. Wurts, Esq., of Germantown; Mrs. George Dallas Albert, of Greensburg; Hon. Edward W. Biddle, of Carlisle; M. S. Lytle, Esq., of Huntingdon; Hon. J. H. Longenecker and Hon. Wm. P. Schell, of Bedford; officers of the Department of the Interior at Harrisburg; the clerk of the national Supreme Court; Prothonotary McCabe, of Lewistown, and other court officers in the counties of Cumberland, Mifflin, Huntingdon, Bedford and Franklin, over which Judge Smith presided, some of whom are mentioned in the proper place. The coöperation of the late Col. Greene, prothonotary of the Supreme Court, and Dr. John W. Jordan and other officers of the Pennsylvania Historical Society, Librarian Luther E. Hewitt and other officers of the Law Association, T. Elliott Patterson, Esq., Librarian Samuel, Librarian (Mrs.) Klingelsmith, and others of other libraries and collections, would be gladly recognized more fully did space permit.

Finally, it does not seem as though I could let pass this opportunity to express my appreciation of the frequent and suggestive helpfulness and encouragement of our Chief Justice, the Hon. James T. Mitchell, not, indeed, so much in this particular work, but in all my historical studies in Pennsylvania.

BURTON ALVA KONKLE.

SWARTHMORE, 1903.





## Introduction

Horace Binney, in writing of the Supreme Court of Pennsylvania as it was at the time he came to the bar in 1800, thus speaks of one of its members :

"Smith was defectively educated in the law, but by great industry had amassed a considerable knowledge of it. He was, like Yeates, a case lawyer, inferior, however, to him in the extent of his learning, and even less inclined to leave for a moment the support of adjudged cases for that of principle—a good fault in moderation but a gross one in excess. He was rough and bearish in his manners, uncouth in his person and address, and was incapable of raising the skin by a reproof without making a gash. But he was a truly honest man, as far as his prejudices, which were probably unknown to himself, would permit, and under that shaggy coat there was a kind and warm heart. He had been a deputy surveyor, and from this perhaps got the habit of always moving in a right line—that is, the shortest line to his point—and thus contrasted broadly with the waving lines of the Chief Justice (Shippen) and Mr. Yeates, though, if he had had more knowledge of the law and the general affairs of men, his disposition in this respect would have been best for the bench and the public. His notions of ceremony were very strange, and with his utter inability to dress, or make a bow, or do anything else like other people, made him in some situations irresistible. Mr. Rawle upon one occasion invited some of the bench and bar to dine with him at Harley, his summer residence near the Falls of Schuylkill, and I was one of the number. It was a day in July, excessively hot, and the Ridge Road dusty to suffocation. I went with some of my young friends in a hackney coach, and we overtook Judge Smith on the road. He was on horseback, in enormous boots that came above his knees like a fisherman's, a cocked hat exposing his whole face to the fiery sun, and a full cloth dress which had been black probably when he

set out, but when we saw him was most dirty drab. Some fifteen minutes after our arrival he came into the saloon where the company had assembled. His hat was then in his hand, but on his head was a mass of paste made by the powder and pomatum, a part of which had run down in white streams upon his face, as red in all the unplastered parts as a boiled lobster, and his immense boots and spurs, broad skirted coat, and the rest of the appearance I have described, made him the most extraordinary figure for a summer dinner that I have ever seen; but he did not appear to think that he was otherwise than he ought to be for the honour of his host, or for his own comfort. To this person I owe more real civility and kindness, both at the bar and elsewhere, than to any other Judge of the Court until the time of William Tilghman. I know, moreover, from the representation of one who knew him better than I did, that he was susceptible of the noblest emotions of generosity and benevolence."

The man thus graphically described was Thomas Smith, the subject of the following Memoir. He was one of a group of interesting young Scotchmen—James Wilson, Hugh Henry Brackenridge and Alexander Addison—all born within a comparatively short distance of each other in their mother land, and all attaining high judicial places, the first in the Supreme Court of the United States, the latter in Pennsylvania, the State of their adoption.

Thomas Smith arrived here in 1768 at the age of twenty-three years, whither his distinguished half-brother, William Smith, the first Provost of the University of Pennsylvania, had preceded him. The brothers became in a very real sense, though working in different fields, builders of the Commonwealth.

Few, even of the closest readers of Yeates's Reports, have noticed in Volume I the following memorandum: "*The Honorable William Bradford, Esquire, resigned his commission as one of the Justices of the Supreme Court the last day of this term, and was appointed Attorney General of the United States. The Honorable Thomas Smith, Esquire, was appointed to succeed him, and his commission QUAMDIU SE BENE GESSERIT, dated the Thirty-First of January, 1794, was published in open Court on the Seventh of April, 1794;*" and fewer still will recall the fact that he occupied his high place for a period of more than fifteen years as the Associate of Chief Justices Shippen and Tilghman. He was useful

to both of them because of his practical as well as legal knowledge of the land laws of the State, and both at times leaned heavily on him. His preparation for his most important work had been varied and peculiar. A surveyor and a pioneer in that portion of the State which embraces the present counties of Bedford and Huntingdon, he soon added the duties of lawyer, prothonotary, clerk, recorder and Justice of the Common Pleas and Member of the Assembly; at the same time that he held a commission as Colonel of the Second Battalion of the Bedford County Associators, he served as a member of the Committee to draft instructions to the delegates in Congress in company with John Dickinson, Robert Morris, Joseph Reed and George Clymer. Later, a member of the Constitutional Convention of 1776 which gave a new Government to Pennsylvania, and still later a member of the Continental Congress, diligent in the work of restoring national finances, he retired in 1782 to resume his practice at the bar and became a leading land lawyer. Nine years afterwards, upon the reorganization of the judiciary under the new constitution of 1790, he became President Judge of the Fourth Judicial District, and then four years later a member of the Supreme Court under the appointment of Governor Mifflin.

Surely such a career as this—which has been drawn in mere outline—is deserving of detailed review.

The work has been done, and well done, in the following Biography. It concerns the life and acts of a thoroughly representative man, a man who in many and diverse fields of action wrought side by side with those who built up the Nation and the State. The great value of the work accomplished by the author consists in the painstaking accuracy with which he has explored original sources of information—much of it hitherto unpublished and unknown—and in the admirable manner in which the result is presented. To all students of the origin of our State and National institutions, particularly in the matter of our State judiciary, the work will be welcome, revealing the richness and completeness of thorough research in territory thought to be barren, but productive of much which throws strong light on subjects imperfectly understood for too long a time.

HAMPTON L. CARSON.



# I

## HIS SCOTTISH ORIGIN

1745

A far cry it seems to the fall of the clans of Scotland, and yet it was only in 1745 that Prince Charles came up and fanned the smouldering discontent against the Union, which had not been aflame for thirty years. The dissatisfied flocked to his standard reluctantly, fully realizing its futility, and before the winter had long passed, the clans had received their death-blow at Culloden,<sup>1</sup> while the Jacobite songs were turned to lamentation over the waste places of bonnie Scotland.

During the summer and autumn months of this comparatively brief revolution there was in that bleak but hardy northeastern county of Aberdeenshire, which suffered so severely, a wife, Elizabeth by name, who was about to become a mother.<sup>2</sup> Whether her husband, Thomas Smith, a man in his fifty-fourth year, was with her or was in the armies of Prince Charlie and the Earls is not known, but one day in October of that year, 1745, she gave birth to their first child, a son, to whom she gave his father's name.<sup>3</sup>

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<sup>1</sup> The battle of Culloden occurred on April 16, 1746.

<sup>2</sup> Letters in the possession of W. J. De Renne, Esq., of Wormsloe, Savannah, Ga., written by Judge Smith to his mother, are addressed "Mrs. Elizabeth Lawrence," as early as 1767 and after the American Revolution. This indicates that she was married again after the death of Thomas Smith, Senior, to a Lawrence; and the fact that a eulogy of Captain James Lawrence, of the "Chesapeake," printed on silk, is preserved among these old letters, has raised the query whether some relationship did not exist between them.

<sup>3</sup> It was not uncommon in those days for birthdays to neither be recorded nor remembered in that part of the country. Even so late as September 16, 1804, Judge Smith wrote to his cousin, Dr. Peter Smith, of Aldie, in Cruden parish: "Can you inform me correctly as to the time of my birth? \* \* \* I believe I am 58 or 59 next month. I am anxious to have the uncertainty re-

The blight that Culloden threw over Scotland's mothers, as described by Smollett in his "Tears of Scotland" in 1746, did not fall upon the mother of the child Thomas:

"The pious mother, doomed to death,  
Forsaken, wanders o'er the heath;  
The bleak winds whistle round her head,  
Her helpless orphans cry for bread;  
Bereft of shelter, food and friend,  
She views the shades of night descend,  
And stretched beneath the inclement skies,  
Weeps o'er her tender babes, and dies"—

for she was spared longer even than either father or son, and reached the great age of ninety-six years, at least. She was in 1809 still living at her own home in Udny with her widowed daughter, Jean, where she survived all her sons and treasured such letters of her first-born, Thomas, as are known to contain facts regarding his early life. Born in 1713, she was married near the close of October, 1744, in her thirty-second year, to Thomas Smith, the elder, as his second wife.

Of Thomas Smith, Senior, personally, little seems to be known. Born in 1692 in Aberdeen, he was the younger son of Dr. James Smith, of Turnielief, or Turnielove, Cruden parish, Aberdeenshire, a physician who won something of a name as an astronomer—a branch of learning, by the way, to which his grandson, William, was also greatly devoted. Dr. Smith and several generations before him, it is said, lived on the Turnielief homestead, which afterward became a part of the domain of the Earl of Errol. Dr. James Smith's father was William Smith, who was born in 1620, the only son of Sir William Smith, who died in the year 1631. Sir William's father, John

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moved and I am afraid Registers were not then kept in your part of the country." Dr. Smith, who acted as correspondent for the aged mother, writes on March 25, 1805: "Your mother says she was married in the end of Octr 1744 and you were born in Octr 1745—so it would appear that your Brother the Dr had been right about your age." This letter also gives the date of her own birth. Dr. Peter Smith is the physician mentioned by Boswell in his Life of Dr. Samuel Johnson, as educated by the Earl of Errol. Thomas Smith, Senior, is not in the list of rebels of 1745, published by Lord Rosebery for the Scottish Historical Society in 1890, although there are many other tenants of the Countess of Errol there.



COAT-OF-ARMS  
OF THOMAS SMITH  
from only known impression,  
in possession of  
W. J. De Renne, Esq.,  
Wormsloe, Savannah, Georgia.  
"Argent; an unicorn head  
erased armed proper; on a  
chief wavy gules three  
mascles of the first. Crest: A  
dexter arm in armour, en-  
bowed, proper, holding a  
lance. Motto: Virtute sine  
timore"





Smyth—afterward Smith—who married Agnes Charnock of an ancient family of Lancaster, was a descendant of Sir Roger Clarendon, son of Edward, the Black Prince.<sup>1</sup>

Like Sir William's father, Thomas Smith, Senior, also married into an ancient family. His first wife was Elizabeth Duncan, of the celebrated Camperdown family, and it was at their home on the banks of the Don, not far from Aberdeen, that their sons Charles and William were born, the latter on September 7, 1727, almost exactly eighteen years before the birth of their half-brother, Thomas Smith, Junior. When Mrs. Thomas Smith, the first wife, died is not known, nor is it certain where Thomas Smith made his new home with his second wife, though in all probability it was in Cruden. Certain it is that in her old age she expressed a wish to be buried in that place or parish, and her son Thomas spoke of a place one mile from Cruden as "so near the place of our nativity" and Aldie in Cruden parish as "at the place of my nativity"<sup>2</sup>—so that Cruden parish, if not the village, or old Turnielief,

<sup>1</sup> This ancestry, for the most part, is said by Horace Wemyss Smith, in his *Life of Rev. Dr. William Smith*, to be from records of Aberdeen University and Dr. William Smith's own manuscript. As he is in error regarding the name of Judge Smith's mother, and Charles being a full brother, an attempt has been made to confirm the other facts; but the librarian of Aberdeen University writes that they have no record of the ancestry of Dr. William Smith. On the other hand, it seems to be correct in the name of Judge Smith's father, as most of the De Renne papers confirm it, although one letter from Mrs. Margaret M. Smith, of Banff, on December 26, 1885, makes her great-grandfather, James Smith, brother of Thomas, Senior, the father of Judge Thomas and Dr. William Smith, and his home to have been Toddle Hills, parish of Longside, Aberdeenshire, west of Cruden. George Wymberly Jones De Renne was evidently inclined to accept the authority of this letter as to who was his great-grandfather. The testimony above referred to is a sheet containing matter dictated by Dr. James Smith, a son of Dr. Peter Smith, of Aldie, and comments by "G. W. S.," the late George Washington Smith, only son of Judge Smith. Dr. Peter Smith's father was James, brother of Thomas, Senior. In a letter of Judge Smith to Dr. Peter Smith, dated January 29, 1807, and calling him "My dear cousin," he speaks of "Your Father and Mine, and our Uncle Charley," the only mention of Judge Smith's father in all his correspondence.

<sup>2</sup> Letters of December 3, 1784, to Dr. Peter Smith, surgeon at Slains Castle, and June 17, 1793, to same who had then bought an estate at Aldie. Turnielief is about a mile and a half north of Slains Castle; Aldie, about the same distance northwest of Turnielief.

lays strongest claim as Thomas and Elizabeth<sup>1</sup> Smith's new home in 1744 and the birthplace of their first-born son in October, 1745.<sup>2</sup>

Passing from Aberdeen about twenty miles up the coast, there appear beyond the sandy bay of Cruden the lofty red granite headlands of Cruden parish, surmounted in those days by the great quadrangular seat of the Countess of Errol, Slains Castle, which stood on the very edge of the precipice and looked over the "German Ocean" on a scene of grandeur, said by Dr. Samuel Johnson, on his visit to it in 1773, to surpass anything he had ever beheld.<sup>3</sup> Across those waters to the northeast their nearest neighbors were the Danes, whose Prince, afterward King Canute, in the year 1005, was halted in his conquest of Scotland, only a mile west of the Castle, by King Malcolm II, and so thoroughly defeated that the place has ever since borne the name *Crojer Dane*, or *Kill Dane*, now abbreviated to Cruden. From the village which sprang up about the chapel Malcolm erected there, a parish, stretching about a dozen miles up and down the coast, and about a third as wide, took the same name. Longside and Udny parishes were near at hand, and Peterhead, the nearest large port, was but seven miles northward from the parish bounds.

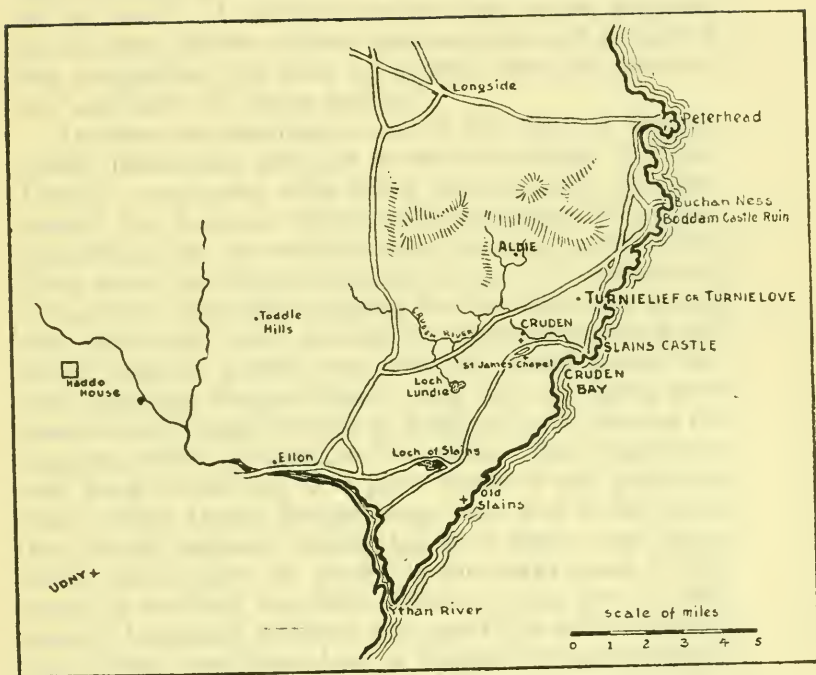
"The natives of this county," says a writer on "The Beauties of Scotland," in 1806, "are regarded throughout Scotland as an unusually active, vigorous and enterprising race of men." No region was known for greater success against equally great obstacles in the nature of the country, which was chiefly an agricultural and dairying one. This region shared, with the rest of Scotland, after the battle of Culloden, in that marked economic reorganization which caused so much hardship for a long time and led to a great deal of emigration to England, America and other coun-

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<sup>1</sup> Mrs. Smith's family name is not known.

<sup>2</sup> Through the kindness of Rev. George Jamieson, D.D., of Old Aberdeen, the registers of Aberdeen and neighboring parishes have been examined between 1736 and 1745, inclusive, and no record of the birth of Thomas Smith, Junior, appears there, the region where his half-brother William was born. Rev. John Strachan, rector at Cruden, says their registers "previous to 1807 are lost."

<sup>3</sup> For the accompanying view of Slains Castle the author is indebted to Rev. J. Strachan, rector at Port Erroll [present spelling], Scotland.



CRUDEN AND VICINITY, ABERDEENSHIRE, SCOTLAND  
after map in  
Lewis' Topographical Dictionary, 1843

The following map of the Gulf of California and the Pacific Ocean shows the location of the Gulf of California and the Pacific Ocean. The Gulf of California is located in the southwestern part of North America, between the Baja California Peninsula and the Mexican mainland. The Pacific Ocean is located to the west of the Gulf of California.

The map shows the Gulf of California and the Pacific Ocean. The Gulf of California is located in the southwestern part of North America, between the Baja California Peninsula and the Mexican mainland. The Pacific Ocean is located to the west of the Gulf of California.



Map of the Gulf of California and the Pacific Ocean.

The map shows the Gulf of California and the Pacific Ocean.

The map shows the Gulf of California and the Pacific Ocean. The Gulf of California is located in the southwestern part of North America, between the Baja California Peninsula and the Mexican mainland. The Pacific Ocean is located to the west of the Gulf of California.

tries. Udny parish, for example, which had a population of 1322 in 1755, had lost nearly a sixth by the end of the century. Episcopalians were more numerous than Presbyterians, and there were many Catholics. No region prized education more, and the parish schools, good then, became most excellent in later years, by virtue of two great bequests to them. The dialect of English spoken there was much different from that of Burns and Ramsay in the South. A tradition comes down to us, too, that the Scottish Smiths of these parishes were not usually of fair complexion, but were so swarthy that they received the sobriquet of "Black-Smiths."

In these surroundings occurred the birth of Thomas Smith, Junior, and although it was in the midst of Prince Charles' revolution, with which the Countess of Errol quietly, but, it seems, effectively sympathized, the nearest skirmish of the war was no nearer than the banks of the Don, about two months after his birth. It is interesting to note now, and will be helpful later to recall, that at this time there was, about seventy-five miles down the coast, at St. Andrews, a child two years old, named James Wilson, who was destined many years later to divide legal honors with young Thomas in a distant land; that on the opposite side of Scotland, at Campbelton, three years later was born to the wife of a poor farmer a son given the name Hugh Henry Brackenridge, who was to sit beside him on the supreme bench of a great State; that about thirty miles above, at Banff, on the north coast of this point of Scotland, was born, fourteen years later, a child named Alexander Addison, who was to be a fellow President Judge; and that about a hundred miles northwest, near the northernmost point of the Scottish mainland, at Thurso, was a boy of eleven years, Arthur St. Clair by name, of the same family as the Earl of Roslyn,<sup>1</sup> who was to be one of young Thomas Smith's most intimate friends in their struggles in a new land. Five years later, also, there was born, a few miles away, a son of the Earl of Buchan, afterward famous as Lord Thomas Erskine, whose children became friends of those of Thomas and

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<sup>1</sup> William Henry Smith, the editor of St. Clair's Letters, says he was not the grandson of the Earl, as has been supposed, but both were descendants of a common ancestor.



his brother in the long years that followed.<sup>1</sup> Finally, it may be noted, that at the time Thomas Smith, Junior, was born, there was down at Aberdeen University, some twenty miles away, a half-brother of striking talents within two years of graduation, William by name, then about nineteen years old.

By the time Thomas was five years old William had graduated and gone to London, where his agitation for enlarged plans for the parochial schools of all Scotland won him a most favorable fame. In 1757, when Thomas had reached his thirteenth year, his father had died at the age of sixty-five years.<sup>2</sup> His half-brother Charles had gone to London and William had gone to America, where he was the successful first Provost of the new College of Philadelphia in the metropolis of the North American colonies.<sup>3</sup>

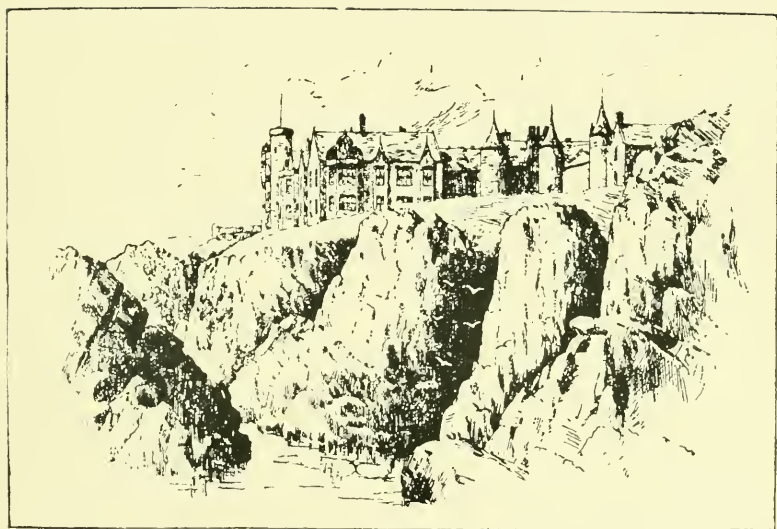
There are indications that life now became something of a struggle to the widow and her children, for she now had a daughter and, it is believed, other sons, whose careers must have been comparatively short, however. We know but little of the details of these years. Thomas no doubt had the advantages of the parish schools, in which Provost William had had so much interest, and with all the affection we know to have existed between these brothers throughout their long lives, and the repeated reference of Thomas to his brother as "my benefactor," it would be strange, indeed, if so able and enthusiastic an

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<sup>1</sup> In a letter of Judge Smith to Dr. Peter Smith, dated the 3d of January, 1805, he speaks of sending a copy of the recently published works of the Provost to London for him, "by Mrs. Cadwalader, the widow of the late General Cadwalader and sister to Mr. Bond, who is going in the spring to London to reside the remainder of her days with her daughter, who is married to the eldest son of the celebrated Mr. Erskine, the brother of the Earl of Buchan."

<sup>2</sup> In a letter to Dr. Peter Smith, whom he addresses as "My dear cousin," under date of January 29, 1807, he says he is impressed with the fact that his cousin's father and his own and their uncle "each died in his 65th year."

<sup>3</sup> The next year, 1758, by the death of the Countess of Errol, her nephew, Lord Boyd, son of Lord Kilmarnock, who was beheaded at the close of the revolution in 1746, succeeded her as Earl of Errol. His brother, Charles Boyd, spent much time there, and in Thomas Smith's letters to Dr. Peter Smith, who became the Earl's physician at Slains Castle, there is evidence of Thomas' familiarity with their careers.



SLAINS CASTLE, ABERDEENSHIRE, SCOTLAND

From a view furnished by Rev. J. Strachan, Rector at Port Erroll, Scotland





educator as was the head of the vigorous young college across the sea, on the banks of the Delaware, should not have taken great interest in his young brother's education.<sup>1</sup>

In 1762 the brilliant thirty-five-year-old Provost came over to England in the interests of his college, and his successes were met by the highest honors from both universities and ecclesiastical bodies.<sup>2</sup> Thomas was now seventeen years old, and his mother has left record that he was "always a good and kind lad" to her, and in later years she used to hum over one of what she said was his favorite songs:

"Be kind to me as long as I'm here,  
I'll may be wear away yet."

Both his elder brothers were now in London, Rev. Dr. William and Charles, the latter there in business, that of a stationer, it is said, and the same year Thomas left Scotland for the metropolis to live with Charles, of whom Thomas' mother had a very high opinion.<sup>3</sup> The Provost also had so high an opinion of him that he gave his own favorite son his name, three years after this date, while Thomas himself, writing to his mother, from London, under date of September 7, 1767, says: "It is but doing

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<sup>1</sup> Galt, the biographer of Benjamin West, says on pages 71-2, that Governor Hamilton received a portrait of St. Ignatius which suggested to Provost Smith, with whom West was then studying, that a portrait should be characteristic and that such art would be only inferior in dignity to history. Thereupon West experimented upon a portrait of the Provost, which now hangs in the hall of the Pennsylvania Historical Society. The accompanying photographic reproduction of it is the most successful one yet secured.

<sup>2</sup> The following letter of Rev. Jonathan Boucher, of Castle-Magruder, to George Washington, on January 19, 1773, while expressing some limitations in regard to Dr. Smith's education not usually known, is at the same time a great testimonial to his genius: "The Presidt of the Coll: of Philada, whose abilities are unquestionable, was himself brought up in Scotland, in a less regular manner, than is the Fortune of scholars in general: &, in spite of his great merit, this must be some disadvantage to him in the office he holds. By dint of superior genius He has himself arriv'd at Eminence in Literature, by a nearer cut, as it were: but the bulk of men must be enforced to travel thither along the beaten track."

<sup>3</sup> In a letter of Judge Smith to his mother, and dated at Carlisle, Pennsylvania, December 3, 1784, he says of the Provost's son, Charles: "He was not born till three years after I left Scotland," and as Charles' birthday was March 4, 1765, this would make 1762 the time of Thomas' departure for London.

justice to Mr. Charles Smith to inform you that he even exceeds your hopes, if possible, for his good nature; he has been a father as well as a brother to me, and used me just in the same manner as I could have wished to have done him had we been in each other's circumstances. You will be glad to know, therefore, that he is beloved by all who know him."<sup>1</sup>

Thomas was not simply much attached to his half-brother, Charles, who, like the Provost, must have been many years older than himself, but he was permanently impressed with his character and principles. Nearly a score of years after this date he writes: "I ascribe much of the success I have had in the world (under Providence) to those Principles of Truth and Integrity early instilled into me by the example of his [referring to the Provost's son Charles] Uncle Charles, while I lived with him in London—a better man than Charles never lived."<sup>2</sup>

If Charles Smith was both "father and brother" to young Thomas, there is no doubt he provided for his further education, and as the Provost made his headquarters here for the long period of two years, it would be strange, indeed, if he was not a still more powerful and personal influence in their younger brother's education. Any one who has seen the mathematical course, for instance, which Provost Smith gave young Jasper Yeates two or three years before can readily see that two years of even occasional direction from Provost Smith would have, in that branch, given young Thomas a good grasp of even surveying and navigation and still higher mathematics, as they were then taught, before the Provost returned to America in 1764. But we know positively that

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<sup>1</sup> Although this Charles Smith is given in Horace Wemyss Smith's "Life of Rev. Dr. William Smith" as a full brother of Thomas, the latter's mother's statement making Thomas her eldest son confirms all other evidence that Charles must have been a full brother of the Provost, instead. Besides, in another letter, when Charles is still alive, Thomas refers to himself as his mother's sole surviving son. This letter is addressed in care of Mr. Charles Smith, Merchant, Peterhead. It may be possible that he had a branch house at the latter place, where he spent part of his time, although, of course, this may be another person. It is interesting to note here that this is the first letter of Judge Smith known to be extant, and that it addresses his mother as "Mrs. Elizabeth Lawrence," as has been indicated.

<sup>2</sup> The above letter of December 3, 1784, at Carlisle, Pa.



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BURTON ALVA KONKLE

REV. WILLIAM SMITH  
(afterwards D. D.)  
at 30 years of age.

First Provost of The College of Philadelphia,  
now The University of Pennsylvania.

Half-tone from photograph of the painting by Benjamin West,  
in possession of  
The Pennsylvania Historical Society



Thomas studied French during the following year, 1765, and we also know that throughout his life he had the constant self-training habits of an independent student.<sup>1</sup>

It would not have been impossible that he returned with his "benefactor," the Provost, in 1764, and continued his studies in Philadelphia. Indeed, Justice Charles Huston states that he "had arrived from Scotland, a young man, about the year 1764,"<sup>2</sup> and Dr. William Smith's biographer positively states that on September 6, 1766, Thomas and the Provost surveyed and laid out the town plat of Huntingdon, Pennsylvania, land then owned by Dr. Smith.<sup>3</sup> Nor would it be out of the range of probability that he might have made a business trip back to England in 1767. Charles himself is said to have made a trip to America and returned. These would be very attractive speculations were it not for a solitary letter written in that year by Thomas himself, in London. The only light we have on this period is to be gained from this letter, from which has already been quoted Thomas' tribute to his brother, Charles, and for that reason a large part of the rest may be reproduced:

"LONDON, 7th Sept., 1767.

"HONOURED MOTHER:—I expected before this to have sent you something more worth your acceptance than a Letter; But as that is not yet in my Power, I could no

<sup>1</sup> In a letter of September 3, 1797, Judge Smith says: "It is now thirty-two years since I learned French," which would make it in 1765. This is the only definite reference to his education that is known. In Montgomery's "A History of the University of Pennsylvania," 1749-1770, p. 550, "Thomas Smith" is given as a student entered by "Dr. Smith," in 1767; but as "Dr. Smith" also enters a "William Smith" the same year, and it seems strange that the name should not have been entered "William Moore Smith," this does not seem to clarify the problem much.

<sup>2</sup> "Huston on Land Titles in Pennsylvania," 1849, p. 341. Judge Huston writes so much from memory along here, as he admits, that other statements than this one show his details not quite reliable.

<sup>3</sup> "Life of Rev. Dr. William Smith," by Horace Wemyss Smith, Vol. I, p. 397: "On September 6 (1766), Dr. Smith having purchased a tract of land on the Juniata, at the mouth of Standing Stone creek, went there with his brother, Thomas Smith, afterward a Judge of the Supreme Court of Pennsylvania, to survey it. The place is where the town of Huntingdon now stands." The place was merely a trading-post before.

longer forbear to lett you know that I am extremely well at present; I wish that I could have the pleasure to hear that you are the same, But that I cannot yet have because I am going a little way out of London & you would not know where to Direct to me, till I write you again, which I hope will not exceed 4 months.

"When you write to me [again]<sup>1</sup> I should take it extremely kind, if you would do it in the same free manner as you would Speak to your son if he were present; for tho' I cannot at present relieve your necessities, yet it would give me Pleasure to know the situation of your affairs, & who have been your real friends, for they are mine also.

"There is nothing that I desire more than to see you once more; But I am much afraid I never can have that happiness: at least it will be a long time first.

"I hope I shall soon be able to afford you some little assistance. I cannot absolutely promise you anything but this, and this I shall certainly perform, viz. that I never shall have any that can be of service to you without sharing it with you, this my Duty obliges me to do, & my inclination goes along with it, & therefore Distance of Time & Place shall never eradicate or in the least diminish it.

"Give my love to my Dear Sister & be sure to tell her that she must lay aside all thoughts of coming to London, at least yet awhile & I absolutely insist that she do not come at all without my express consent. I hope you know me better than to suppose that I would advise her to anything but what I thought for her good. You in the country have a little too extravagant notions of London, for you generally imagine that every one here must be rich & proud; it's very true many make their fortunes here, but as far as I [can] judge, for one that does so, there are ten miscarry, especially Women—who therefore would run the risk [when] the chance is so great against them!"

Thomas Smith was now twenty-two years old, and it had been five years since he left Scotland. He was fully of age and evidently thinking of America. He never did

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<sup>1</sup> These indicate mutilation of manuscript.



COLLEGE OF PHILADELPHIA  
(Afterwards University of Pennsylvania)  
West Side of Fourth Street, South of Arch. After a drawing  
in possession of the University.





see his mother again, nor his native land, although he had all preparations made for it many years later. It would be January, 1768, before his proposed four months' trip out of London on business would be finished, and then it is, we have reason to believe, that this earnest, tender-hearted son and brother, so appreciative of all that was high-minded and generous, soon bid his native land farewell, and went forth, in a very real sense, to take part in the building up of the land of his adoption.

## II

### THE AMERICA AND PENNSYLVANIA HE MIGHT HAVE KNOWN IN

1768

While Thomas Smith was living in London great events were taking place that were destined to have much to do with his future. Scarcely had he been there a year before an end of the bloody Seven Years' War was made, in February, 1763, which not only made Frederick II of Prussia to be henceforth known as the Great, but by making his kingdom a "great power" first established the modern world of "the five great powers." Furthermore, the aid which England had been giving him in his brilliant fight against much of continental Europe, together with her own successes against France, made Thomas Smith's native land to be looked upon as the leading one of the "five great powers." Still further, in that same February there was effected another treaty which closed an even longer war which his country and her cis-Allegheny strip of American colonies along the Atlantic coast, the home of his brother, the Provost, had been waging practically ever since Thomas was ten years old, to drive out the French from the vast rich territory beyond the Allegheny Mountains, much of it considered the domain of the Ohio Company, formed so long ago as Thomas Smith's third year. With what enthusiasm must he have listened to the Provost tell himself and Charles of the news of the addition to the English colonies of such vast territory as Canada, Nova Scotia, all of the vast "New France" or "Louisiana" from the Alleghenies to the Mississippi, and even Florida! For had not the Provost himself been no small influence in it?

Even so early as 1755 the Provost, alarmed at the action of the French and the disinclination of the Quaker

Assembly of Pennsylvania to go to war, had sounded a warning in "A Brief State of the Province of Pennsylvania," which was published in London and went to several editions.

"You were rightly informed when you were told," he wrote, "that, of all the British colonies in North America, Pennsylvania is the most flourishing. Its staple is chiefly Provisions, of which it produces enough to maintain itself, and a Hundred thousand men besides. From the port of Philadelphia, at least 400 sail of vessels clear out annually. The inhabitants are computed at about Two hundred and twenty thousand, of whom, it is thought, near one half are Germans. Of the Residue not quite two Fifths are Quakers. Above that number are Presbyterians; and the remaining Fifth are of the establish'd Church, with some few Anabaptists." He then proceeds to give the history of Quaker control of the Assembly and their refusal to provide for defense against the French and Indians, even after Washington's and Braddock's defeat, and proceeded to suggest more drastic measures to overcome the difficulty.

This pamphlet had been followed in 1756 by another in both Philadelphia and London.<sup>1</sup> The former one, he said, had fallen like "a Clap of Thunder on our Rulers"—the Quaker Assembly.<sup>2</sup> He pleads for a militia law, for, "Instead of 220 miles Distance, as I said they [the French and Indians] were before, their scalping-parties have been within 65 miles of this city [Philadelphia]." Incidentally he says of the settlement of the colony, "all our good Lands on this Side the Allegheny Mountains are mostly taken up." Speaking of the nature of representation in the Assembly, he says: "We have eight counties, and out of thirty-six Members, the three old Counties, where the Quakers are settled, return twenty-six of the Number. The other five Counties, settled with people of many other

<sup>1</sup>"A Brief View of the Conduct of Pennsylvania for the Year 1755," etc. Copies of both pamphlets are at the Pennsylvania Historical Society.

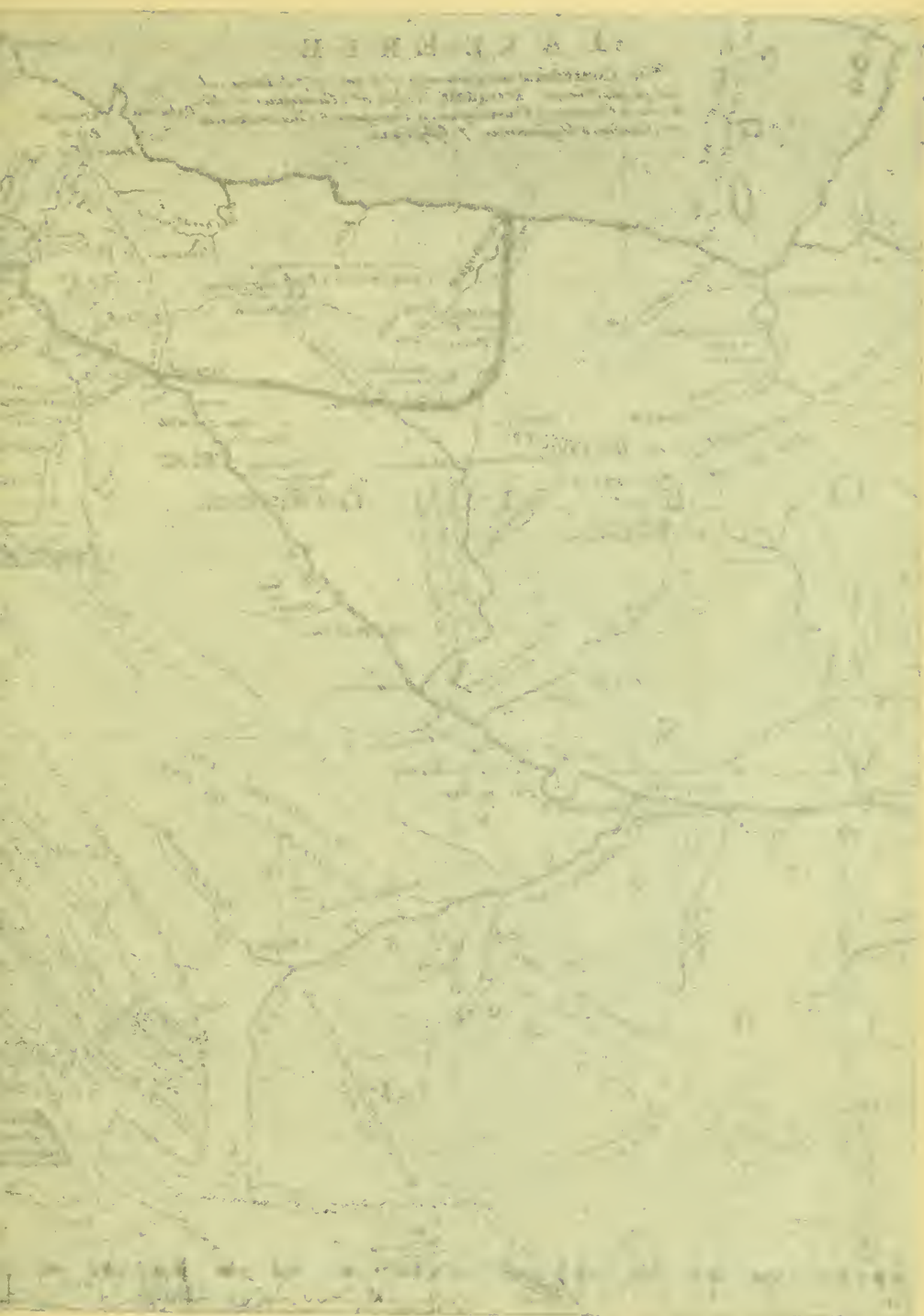
<sup>2</sup>The Assembly put the Doctor in prison, too, although they thought best to release him soon. A humorous account of the episode is given in "A Fragment of the Chronicles of Nathan Ben Saddi; etc., Constantinople, 5707," in which Speaker Isaac Norris is the *Judge*; Franklin is *Adonis*, and Dr. Smith is *Shimei*, not to mention more of the characters. The production sounds very like Dr. Smith's work. A copy is at the Ridgway Library, Philadelphia.

denominations, especially Presbyterians, from the North of Ireland, send only the ten remaining Members among them. This was the policy of the Quakers at the first Erection of the five last Counties; by which means, together with their Artifice among the Germans, the Quakers are always a vast Majority in the Assembly, altho' they are not near one fifth of the People in the Province." He added a postscript on December 15, saying that the day before some "Dutch" from 60 miles up the State had brought the bodies of some of their scalped countrymen "and threw them at the Stadt-House Door, cursing the Quaker principles," and threatening violence. One cannot read it without feeling the excitement of the time, and also realizing that the Provost was certainly filled with the imperial ideas of a British statesman, resident in a colony, rather than those of peaceful Friends. It would be interesting to know what an impression these pamphlets made upon young Thomas, if he ever read them in later years, or the "History of New York" published by his brother the following year. There can be no question, however, of the influence of such a brother's association in those years, 1762-3, in London, when news came of the treaty giving the colonies the vast trans-Allegheny region in February of that latter year.

Now, at the time the Provost wrote his "A Brief State," in 1755, a map of the Middle British colonies was made and published by Lewis Evans, which is here reproduced as giving the best conception of Pennsylvania and the surrounding colonies at that time.<sup>1</sup> This and Evans' earlier map of 1749 were the chief maps in use for the next fifteen years, or until young Thomas Smith aided in surveys for a new one. Here he would see a country that would look as wild, vague and unknown as a map of Africa does to-day. Here was Burlington, the largest place in New Jersey. Philadelphia led in Pennsylvania, with Lancaster second, while round about east of the "Alle-ge-ni" Mountains, or, rather, the Kittatinny Mountains, were "Norriton," Bristol, "New Town," Chester, Reading, Ephrata, York and Harris Ferry, with Carlisle, York, Shippensburg, Rays Town (later Fort Bedford), and nothing else to the west-

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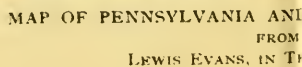
<sup>1</sup> From the copy in the Pennsylvania archives.





The Confederates, formerly of 5, now of 7 Nations, called by the French Iroquois, consist of 1 Caniugaes or Mohawks, 2 Onoyuti, 3 Onontlaques, 4 Cayugas, 5 Chenandoanes or Senecas, 6 Tuffcaroras, 7 Nipisogais.

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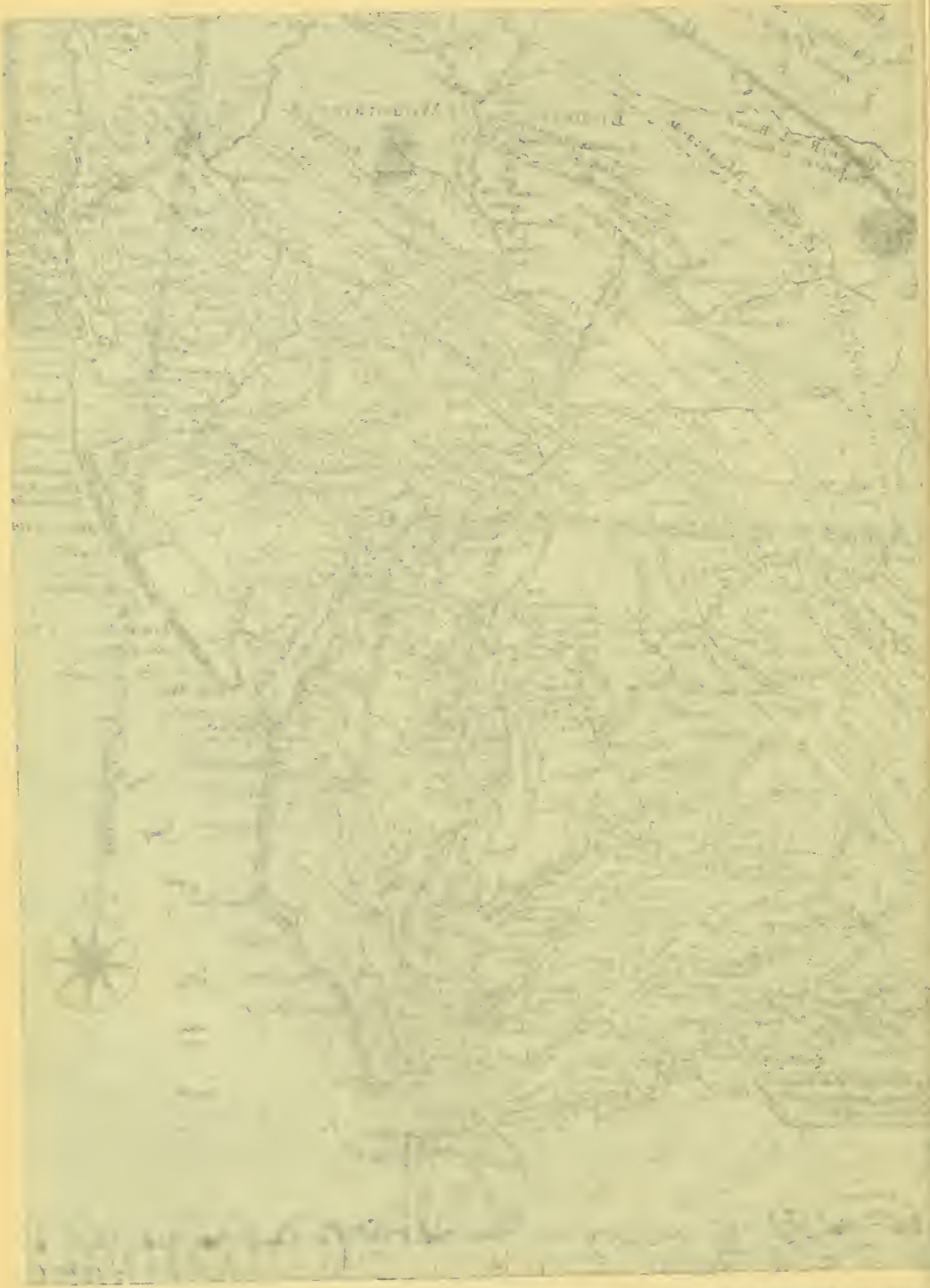


NEIGHBORING COLONIES IN 1755

BY

PENNSYLVANIA ARCHIVES





ward except Fort Du Quesne at the forks of the Ohio. The Delaware Indians were located west of the North Branch of Susquehanna, and the Shawnees beyond, on the Ohio and Allegheny rivers. No boundary of the Province to the west and north is marked, because none had been run. Almost the entire map is a witness to the vague knowledge that even the best of surveyors and map-makers possessed. It was a land awaiting the transit and chain of the surveyor, as one far-seeing young Virginian of twenty-three years, when this map was made, proved by becoming a surveyor himself.

Three years after this map was made General John Forbes and this young Virginian, Washington, had started by way of Rays Town to attack Fort Du Quesne, and make a new road to it, which was destined to be a factor in young Thomas Smith's future activities. General Forbes was successful, and renamed the place Fort Pitt, after the statesman who had planned the campaign. It was six years before the Indians had to be effectively punished again at Fort Pitt, the very next year after that treaty of February, 1763, before mentioned, and the same year that the Provost returned from his two years' residence in England. Colonel Henry Bouquet, who was also a part of the former expedition, was successful in this one, and after his return to Philadelphia, in January, 1765, the Provost, Dr. William Smith, who was an influential friend of Bouquet, wrote an elaborate account of the expedition, with a careful additional study of the Indians and methods of warfare with them, which reminds one of two nations' recent studies of how to fight Boers and Filipinos.

In his introduction, the Provost says: "To behold the French, who had so long instigated and supported the Indians in the most destructive wars and cruel depredations on our frontier settlements, at last compelled to cede all Canada, and restricted to the western side of the Mississippi, was what we had long wished, but scarcely hoped an accomplishment of in our own days." After speaking of the Shawnees, Delawares and other Ohio tribes taking the lead in this new Indian war, he tells of the condition that led to Colonel Bouquet's expedition, saying: "Only the forts of Niagara, the Detroit and Fort Pitt remained in our hands, of all that had been purchased with so much blood

and treasure." News of the surrender of the other forts had "depopulated a great part of our frontiers." His account of Colonel Bouquet's successes seems to be written quite as much as a helpful study of further relations with the Indians, if not more so, than as a historical narrative. As the commander had been made a general, in charge of the southern district of America, it was felt that a lasting peace had been established. Thomas and Charles Smith must have read this book in London some time late in the year, with the greatest interest, for it was published in the summer of 1765, about the time the Provost's son Charles was born. To a young man of twenty years, full of high ambitions, and these further stimulated by the brilliant part his brother was taking in the colonies, this story must have been very suggestive of possibilities for his own life.

There were other events of this year 1765 which must have appeared strange to him, as to many another in England at that time. Great Britain had quietly bought the right to collect revenue in a large part of India, and with it the liberty of that people. She had also taken it for granted in the previous February that her American colonists would let her tax them, too, to pay off the great war debt largely contracted in their behalf. She was surprised to learn, late in the year, that in October, at New York, the united colonies, in a congress assembled, had plainly reminded them that while they might have taxed themselves further to pay for these long, bloody wars, no one else had the power to do so, and, furthermore, they would make it understood they were not natives of India. On December 18 Dr. Smith wrote the Dean of Gloucester:

"With regard to the Stamp Act, or any act of Parliament to take money out of our pockets, otherwise than by our own representatives in our colony legislatures, it will ever be looked upon so contrary to the faith of charters and the inherent rights of Englishmen, that amongst a people planted, and nursed, and educated in the high principles of liberty, it must be considered as a badge of disgrace, impeaching their loyalty, nay, their very brotherhood and affinity to Englishmen, and although a superior force may, and perhaps can, execute this among us, yet it will be with such an alienation of the affections of a

loyal people, and such a stagnation of English consumption among them, that the experiment can never be worth the risque."<sup>1</sup>

If so loyal a British colonial statesman as Dr. Smith held this conviction, it foreshadowed the apparent yielding in the matter in the repeal of the offensive laws the following March, although George III made it plainly known that he still wanted the American colonists to surrender the power of taxation, as tractable India had done. Thomas Smith must have made an impressive mental note of this event, for it was to become vitally influential in his life for many a year to come. As the event had plainly awakened in King George's mind a realization of the power and independence of these colonies, so it revealed a new America to the world of thinking men, and must have aroused a corresponding interest in them, as such aggressive actions always do. If anything would have led Thomas Smith to a more particular knowledge of the colonies, and Pennsylvania in particular, scarcely anything, unless it would be his own decision to go there, would have caused it more than this evidence of the power as well as the spirit of her people. It was not unlike the challenge of Frederick the Great that a new power had appeared, or of Pitt that a new leadership was arising among the nations, of which it would be well to take note. Here were the united colonies presenting a determined resistance to the colonial methods of the rising leader of the "five great powers," and Pennsylvania was the most flourishing colony among them.

While it is not the purpose here to describe the knowledge of Pennsylvania or America which young Thomas Smith then had or afterward secured, a result as impossible as it would be interesting; nor to reconstruct that peculiarly vague knowledge or body of impressions which even the best informed then had, of necessity, as one readily sees from contemporary maps and descriptions, it is deemed helpful to roughly sketch and suggest in this way the events and influences that formed the more intimate setting of the beginnings of his career in a new land,

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<sup>1</sup> Life of Rev. William Smith, D.D., by Horace Wemyss Smith, 1879.

as they always shed light upon and often even explain his course.

With the cessation of Indian difficulties after the Bouquet expedition and the increased immigration, the possession of lands became still more attractive. Pennsylvania had always had great difficulty in holding to her policy of buying lands of the Indian nations before giving titles of them to settlers, and even passed laws forbidding settlement on such unpurchased lands. By the time of Thomas Smith's birth, in 1745, she had bought territory back only to what is now called the Blue Mountains. It had been nine years since the latest part of this had been secured, and it was four years later before another strip was added, carrying the white territory east of the Susquehanna forward almost to the North Branch of that river. This was in 1749, and it was shown on Lewis Evans' map of that year. Nine more years passed before a new acquisition was made from the natives, this time west of the Susquehanna, covering all of that region between the Blue range, the Susquehanna and the Allegheny range, northward to an east and west line a little below the site of the present city of Bellefonte.

It was in this last-mentioned territory that Dr. William Smith began some of the first of his acquisitions of lands which not only became a striking feature of his own life, but became a familiar feature of the land office and even of the Department of Internal Affairs of our day. The first evidence of this desire to acquire some of the new Indian lands is in Dr. Smith's first letter to the Superintendent of Indian Affairs, at New York, after the Bouquet expedition, dated January 13, 1766,<sup>1</sup> in which he says that a friend had informed him of the Superintendent's intention to recommend the friend for a grant of land, and that the friend had kindly agreed to share it with him; that if the Superintendent saw his way clear to do it, Dr. Smith was sure he had influence, both here and abroad, that would effectually support the recommendation. It was in September follow-

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<sup>1</sup> Life of Rev. William Smith, D.D., by Horace Wemyss Smith, Vol. I, p. 391. Of course Dr. Smith's intimate personal interest in this region was due in large part to his activities as an evangelistic and educational missionary leader of his Church, in planting schools and churches out over the State.



ing, it is said, that Dr. Smith, having acquired land on the Juniata, covering the site of a trading-post at the mouth of Standing Stone creek, went out there to formally survey and lay out a town, which took the name of the township there called Huntingdon.

There was both county and township organization at this time. It should be remembered that although the north and west boundaries were not run, even years after this date, the terms of acts creating new counties recognized and incorporated them. The first new county to be cut from one of the three originals was Lancaster, out of Chester, in a most vague act of 1729. Ten years later York was cut out on the west side of the Susquehanna, to include the present York and Adams counties, and but a few months after this there was, in 1750, carved out the vast county of Cumberland. This was to cover all west of York county and the Susquehanna, including, apparently, its North Branch to the limits of the Province. Two years later, 1752, the present Berks county lines on the northeast and southwest sides, extended to the limits of the Province, enclosed a new county called Berks. All within the Province to the northeast was to be Northampton county, while a still vast Cumberland county covered the remainder of the Province. Of course, titles to land were granted by the Penns only in those parts of Cumberland, Berks and Northampton which were within the limits of purchases of the Indians, so that less than half of the last mentioned, scarcely a third of Berks and much less than a third of Cumberland were properly subject to anything but military settlement before 1768. In consequence, a frontier township would open, like the county itself, to the western and northern limits. This was the state of Pennsylvania county organization in 1752 and thereafter for nearly twenty years, and, consequently, this was the county map of the Province in 1766, when Dr. Smith secured his lands on the Juniata river at Standing Stone creek.

Immigration was very great at this time, and the ideas of the new arrivals regarding the colony can be gathered from a popular account of the North American colonies and new lands by Major Robert Rogers, who professed an intimate personal knowledge of them, and believed

that no one man had seen so much of them as he. It was published in 1765<sup>1</sup> and republished in 1767. After speaking of Penn's policy as to Indian lands, he says: "Mr. Penn continued in the country upwards of two years, in which time he formed such an excellent plan for the government of the Province as hath since engaged more foreigners to reside here than in any other part of America. He likewise laid the foundations of the city of Philadelphia, and formed the plan of it, which, for beauty, not only far excells any other in America, but is, perhaps, exceeded by few in the world. This city is situated between two navigable rivers, Delaware on the north and the Schukill on the south, which join each other a few miles below, and is near 100 miles from the bay where the river empties itself. The streets are wide and spacious, with a dry defended walk on each side, and are exactly strait and parallel to each other: the houses in general are well built, and make a good appearance, especially some of the public buildings, which are not excelled by any in the country; such, in particular, is the academy, the state-house and several of the churches. The proprietor's seat, which is the usual place of the Governor's residence, and is about a mile above the town, exceeds any private building in America, both in its magnificence and the pleasantness of its situation. This city has exceeding beautiful barracks for the reception of the King's troops, and has the finest market of any on the continent, being of a prodigious extent and well built, and as well regulated and supplied; in short, scarce anything can afford a more beautiful landscape than this city and the adjacent country, which for some miles may be compared to a well-regulated flourishing garden, being improved, as I have been informed, to as great advantage as almost any lands in Europe; there are in the city about four thousand houses, and about twenty thousand inhabitants"—which he takes for granted

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<sup>1</sup> A Concise Account of North America, etc., by Major Robert Rogers, London, 1765. With all its crudities, this is a most interesting and excellent description of the English possessions in North America at this time. This account is taken from the reprint of 1767, which was edited and somewhat condensed in that issue. A copy of the original edition also may be seen at the Pennsylvania Historical Society.

PENNSY

17  
1752

CUMBERLAND

EDFORD



80°

79°

78°

PENNSY

17

1752

42

41

40

CUMBERLAND

• BEDFORD

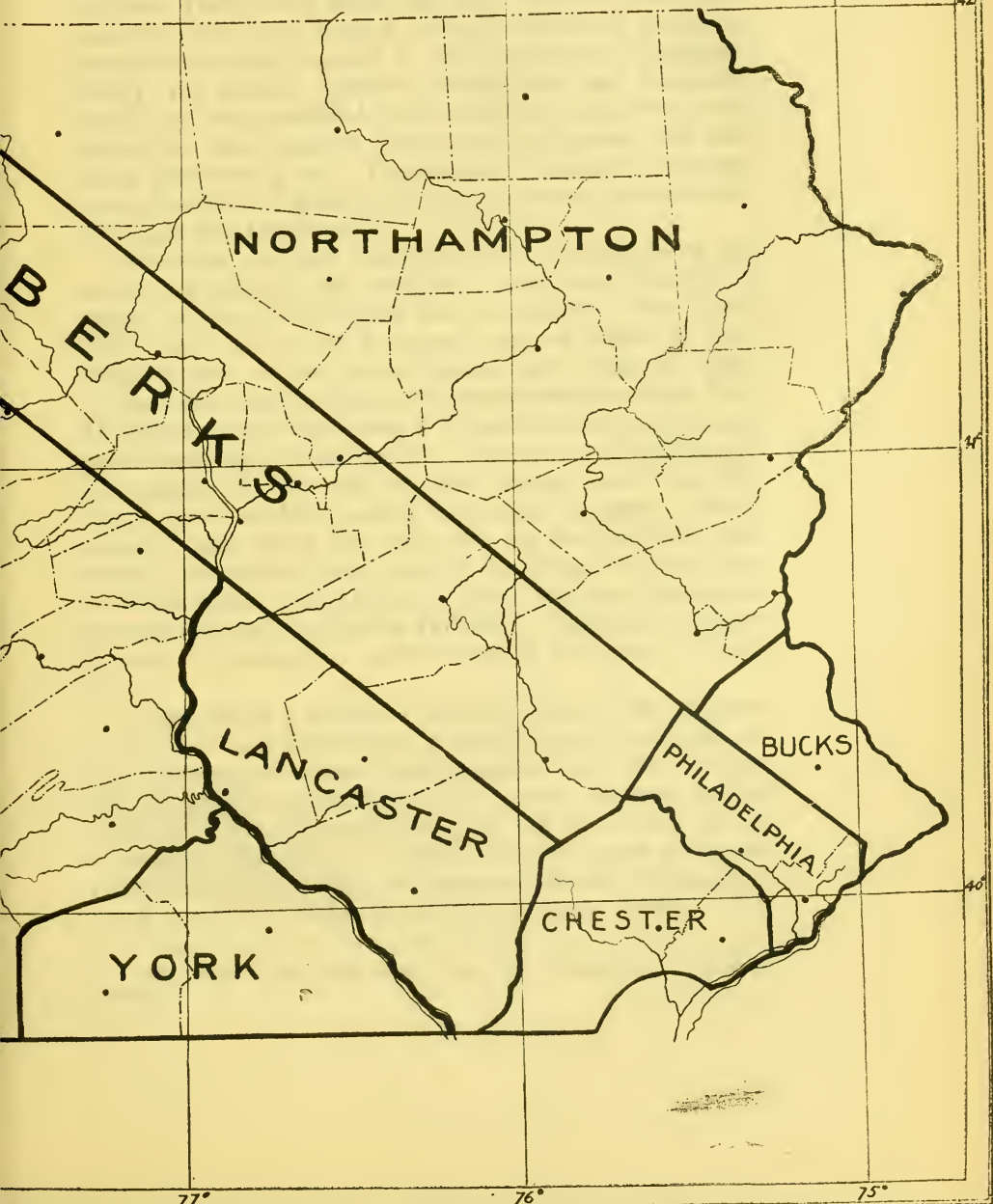
80°

79°

78°

VANIA

71



VANIA

NORTHAMPTON

BERKSHIRE

BUCKS

PHILADELPHIA

CHESTER

LANCASTER

YORK

the reader knows are all within a few blocks of the Delaware river.

"Other considerable places in this province," he continues, "are, first, Lancaster, about sixty or seventy miles from Philadelphia, on the road to Fort Du Quesne or Pittsburg, which [Lancaster] is near as large as the city of New York:<sup>1</sup> and about the same distance from Lancaster, on the same road is Carlisle, and about twenty or twenty-five miles beyond it, is Shippesburg [Shippensburg]; the country between Philadelphia and Pittsburg, which are three hundred miles asunder, being pretty well settled for two hundred miles from the former, the land being uniformly good. The number of inhabitants in the whole province of Pennsylvania are upwards of three hundred and fifty thousand."

From his excellent summary of the conditions of the western wilderness and their tribes, only the following in regard to the Ohio Valley can be quoted: "The River Ohio rises in several branches; one of which is near Presque Isle, on the Lake Ontario, and within six miles of the lake; about ten miles down this branch stands Fort Du Beauf, from which place it is navigable for canoes and small boats quite to the mouth. The course of this branch is southerly for seventy or eighty miles below Fort Du Beauf, where we had another fort, called Venango. About twenty miles above this last fort, on the banks of the stream, are several little towns of the Mingo Indians, who removed hither from Hudson's River, and now belong to those called the Five Nation Indians." This river is joined by two or three other streams before it arrives at Fort Pitt.

"Fort Pitt is a regular well-built fortress, kept in good order, and well garrisoned: it stands upon the point of land between the Rivers Monongahela and Ohio. From this the general course of the river is west, inclining to the south for near a thousand miles, as the river runs, where it joins the Mississippi. At Fort Pitt it is a mile wide, but grows much wider before its junction with the Mississippi, being joined by several streams in its course thither.

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<sup>1</sup> On page 65 he says New York has "between 2 and 3000 houses."

"As far down the Ohio as the River Wabach, the country on each side is claimed by the Five Nations: the Shawanees at present inhabit it, who can raise about three hundred fighting men; and further eastward, toward Lake Erie, live the Delawares, who can raise about five hundred fighting men. These are in league with the Five Nations, and hold their lands under them, and are sometimes called the Six Nations; and all together, since this alliance, which is of some years standing, have the general appellation of the Six Nation Indians.

"West of the Wabach, as far as the Mississippi south, to where the Ohio joins it, and north to the heads of the Wabach and Yeahtanees Rivers, the country is owned by the Tweightwees or Yeahtanees Indians, who can furnish out about two thousand fighting men. Their chief settlements are at the heads of the before-mentioned rivers.

"The country between the lakes and the junction of the Ohio and Mississippi, for several hundred miles, and the country between Fort St. Joseph and the Green Bay, and between Detroit and the Illinois, and even much farther north than Detroit, is level; the soil excellent, the climate healthy and agreeable, and the winters moderate and short. Its natural productions are numerous and valuable. It is sufficiently timbered with trees tall and fair, and fit for any common use.

"There is a good coal-mine near Fort Pitt, made use of by the garrison for fuel; and what is still more in commendation of this country, is that it is well watered by springs and rivulets, and has an easy communication with the whole world from the mouth of the Mississippi, and with great part of the interior country of North America, by its several branches. Indeed such is the situation of this country, that, at or near the junction of the Ohio and Mississippi, within a century or two, may possibly arise the largest city in the world."

Fort Pitt was the key to this vast land, and by 1767, as has been seen, the road through Lancaster and Carlisle, and Forbes' road from Rays Town, or Fort Bedford, on, was the main highway to it. It was along this strategic road, in the Ligonier Valley, some miles eastward of Fort Pitt toward the Laurel Hill, that young thirty-years-old Lieutenant Arthur St. Clair secured land in 1764, and by



1768 was an established and well-known resident. By this time, too, James Wilson, at the age of twenty-six, was settled on this highway, beginning the practice of the law at Carlisle and Reading, while at Lancaster young Jasper Yeates, at the age of twenty-three, had already been settled long enough to have a fair practice even at this time. On the other hand, young Brackenridge was just entering the college at Princeton, and Thomas Smith was still in London, both, probably, having already cast longing glances at this highway to the great West.

By the time Thomas Smith's four months' trip out of London was to close, in January, 1768, Governor John Penn and the Assembly at Philadelphia, under the leadership of Speaker Joseph Galloway, were having much controversy over the settlement of whites on Indian lands, the cause of growing discontent among the Indians. The line between Maryland and Pennsylvania had been run during the previous year out beyond the Laurel Hills far enough to convince Pennsylvanians that Western settlements in the region of Fort Pitt were in their own territory, although they were made largely by Virginians. It became evident that the time was about at hand for acquisition of all the Indian territory now being so persistently settled against the law, although a severe statute was enacted, providing for the removal of these intruders. Of course, this law did not refer to those military settlements made on the road to Fort Pitt to hold that highway open. The situation was daily growing more strained, because these intrusions had given opportunity for individual conflicts between the two races, which involved the situation still more.

So, also, were the relations between the colonies and the government in London growing more irritated, and the letters of "A Farmer," which had just begun in the *Pennsylvania Gazette*, at Philadelphia, were sounding a warning, saying: "Unless the most watchful attention be exerted, a new servitude may be slipped upon us, under the sanction of usual and respectable terms."<sup>1</sup> His warnings proved to be merely expression of what was in the heart of almost every colonist:

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<sup>1</sup> Letter VI, in the *Gazette* of January 7, 1768.

"Hail! Beloved countryman! Farmer blest!  
 America's best son—by all cares'd!  
 Thrice hail! Thou grand Assertors of her Rights!  
 ('Tis Nature's cause! 'Tis Nature's God invites!)  
 'Long in obscurity they hidden lay—  
 'Till thou clear'd the Rust—and bro't 'em forth to-day!  
 Of men most worthy! Freedom's dearest Friend!  
 May Heav'n on thee, its choicest Blessings send!  
 Grand Advocate of Truth—write on—'spare not'—  
 Thy Farmer's Letters ne'er will be forgot!"—

was a part of the outburst of one "Son of Liberty" in Mr. Bradford's *Pennsylvania Journal* of the same date.

Franklin was in London representing the colonies, and as Pennsylvania's agent. Whitefield was at the zenith of his fame. William Allen was Chief Justice of Pennsylvania, with William Coleman, John Lawrence and Thomas Willing as associates, and the Assembly of the previous year had tried hard to perfect a system of Nisi Prius Courts by which these Judges should carry justice to the remotest corners of the Province, instead of bringing the inhabitants to Philadelphia, for it must be remembered that local courts were held by Justices of the Peace. Benjamin Chew was Attorney-General, and, finally, the Surveyor-General of the Province was John Lukens, under whose direction deputies surveyed the new lands which had been bought of the Indians ten years before, or were now soon to be purchased.

In these very early months of 1768, while Thomas Smith was completing his four months' trip out of London, preparations were being made for a new treaty, and, with a curious coincidence. Dr. Peters, Rector of Christ Church, had long been Secretary of the Provincial Land Office before he became Rector, and during that period had acquired such a familiarity with Indian affairs that Sir William Johnson and his deputy, George Croghan, asked the Rector to join them in the forthcoming meeting at Fort Stanwix for the settlement of an Indian boundary and purchase of lands. Dr. Peters consented to go, if he could secure the Provost of the College of Philadelphia, Dr. William Smith, to take his place as temporary Rector of Christ Church, an arrangement which was readily made. This treaty would make necessary a still larger number of deputies for Surveyor-General Lukens, and if a young half-brother of the temporary Rector of Christ Church

should desire to come from London with a belief that here was a fine opportunity for a beginning in a new land, there were abundant influences to secure anything for which he was fitted.



### III

#### THE YOUNG SCOTCHMAN LEAVES LONDON TO BECOME A PENNSYLVANIA SURVEYOR

1768

Some time after his return from that four months' trip out of London, early in 1768, Thomas Smith left his brother Charles and his home on the Thames to settle in America. Landing in Philadelphia, he seems to have had some experience in miscellaneous surveying for a time, either under his brother, Dr. William Smith's, direction, or that of Surveyor-General Lukens, or both, for the earliest plausible evidence of the young surveyor's work that we have is closely and picturesquely related to both men.<sup>1</sup>

One of the best-known landmarks in the territory of Pennsylvania from the earliest times known to either Indians or whites was the *Onujutta*, or Juniata, which means "Standing Stone," at the mouth of Standing Stone creek, at the present city of Huntingdon. This seems to have been a venerated monument to the Indians, who, tradition says, thought its removal would be coincident with their own departure, as it really proved to be, for in 1754, when that deceptive treaty was made which gave

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<sup>1</sup> The case in 2 Smith's Laws, 155, which is the earliest apparent evidence of Smith's residence in America, speaks of a warrant issued in 1763, and directed to Thomas Smith for survey, but it gives no proof that it was directed to him in 1763, and does show that Smith surveyed lands for the parties in 1774, nine years later. The warrant was no doubt an unlocated warrant, such as often passed from hand to hand long before survey. It is notable that the evidence as given in court always says it "appears" to have been directed to Smith, as it probably was, but at a far later date. Nor does the statement by Horace Wemyss Smith, that he aided his brother, the Provost, in the laying out of the plat of Huntingdon in September, 1766, bear the most careful scrutiny of the late Hon. J. Simpson Africa, the historian of Huntingdon, who himself had a copy of the plat, and states that it was made in 1767, with no mention of who was the surveyor. He does mention Samuel Finley as surveying some of Dr. Smith's land there in May, 1766.

the whites all of Pennsylvania west of a northwest by west line from near the Susquehanna forks to Lake Erie, the Delawares and the Standing Stone disappeared from the river which bore its name, Juniata. It is well known that this treaty had to be replaced by that of 1758, and was a leading cause of Indian aggressions for ten years more. The Standing Stone lands passed from one hand to another until, on March 25, 1766, George Croghan sold that part called the Standing Stone tract to Dr. William Smith, and in 1767 the town of Huntingdon was laid out.<sup>1</sup>

It is known that a new Standing Stone was erected, for David McMurtrie, who was still alive in 1843, saw it as early as about 1776 or '77, a stone about eight feet high and bearing the date 1768, with the names of Surveyor-General John Lukens, his assistant, Charles Lukens, and that of young Thomas Smith, who may have been then surveying for his brother and assisting the Surveyor-General, or getting that acquaintance with the new lands which would properly prepare him for a Deputy Surveyor.<sup>2</sup> Whatever he may have been doing, it seems strange that these names and this date, 1768, should have been placed upon this historic "Standing Stone," unless it was to inform all who looked upon it when and by whom it was erected.<sup>3</sup> Certain it is that careful students have

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<sup>1</sup> "An Historical Address. Delivered by Hon. J. Simpson Africa, at the unveiling of the Standing Stone monument." 1896, p. 11.

<sup>2</sup> "Historical Collections of the State of Pennsylvania," by Sherman Day, 1843, p. 370. John Lukens was a grandson of Jan and Mary Lücken, one of the families of weavers who came from Crefeld, Germany, in 1683, and took part in the founding of Germantown, Pa. He was born in 1720, and made his home at Horsham until he became Surveyor-General of Pennsylvania and Delaware in 1761. After that he resided in Philadelphia. He held this position until the Revolution, and at the close of that conflict, in 1781, was restored to the same position for Pennsylvania. He was known as a very able man in these lines, and was one of those chosen to observe the transit of Venus in 1769. He retained his position as Surveyor-General until his death, in 1789. Charles Lukens, who died about 1784, was his eldest son and one of his deputies.

<sup>3</sup> This "Standing Stone" was destroyed in a drunken mêlée some years ago and part of it was built into the foundation of the house of Hon. John M. Bailey, northeast corner of Third and Penn streets, and the part bearing the names came into the hands of Edward C. Summers, and is on exhibition among the antiquities there at the college.

shown no proof to the contrary. There would be every reason why the Surveyor-General should desire such a permanent and well-known landmark restored on the eve of the acquisition from the Indians of a vast new territory so near at hand.

On September 7 of that year, Governor John Penn wrote the Assembly that he was "obliged to attend a treaty shortly to be held with the Indians at Fort Stanwix, for the important purpose of settling a general Boundary Line between them and this, and the neighboring colonies,"<sup>1</sup> and on November 5 the treaty was signed and certain lands bought of them by the Province. This information was conveyed to the Assembly in a message dated the 16th of January following (1769), and as the tract was a peculiar one, running diagonally across the Province from northeast to southwest, narrow in the middle and enlarged toward the corners, a clearer idea of it may be gained by giving both a description and a map of the boundaries:

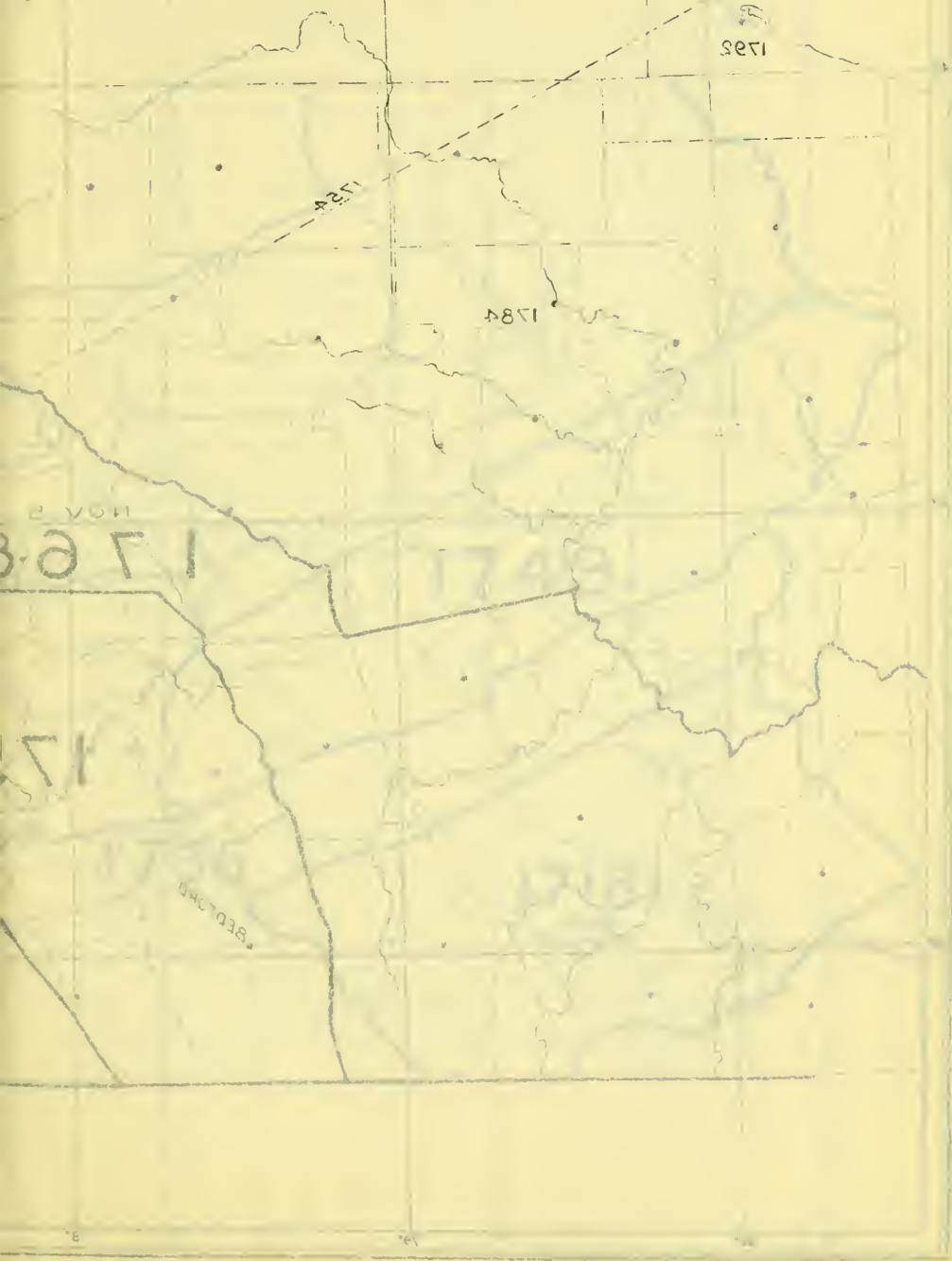
"Beginning in the said Boundary Line," the description reads, "on the East side of the East Branch of the River Susquehanna, at a place called Owegy, and running with the said Boundary Line down the said Branch, on the East side thereof, till it comes opposite the mouth of a Creek called by the Indians Awandae, and across the River, and up the said Creek on the South side thereof, and along the Range of Hills called Burnett's Hills by the English, and by the Indians [ ] on the North side of them to the Head of a Creek which runs into the West Branch of Susquehanna, which Creek is by the Indians called Tiadaghton, and down the said Creek on the South side thereof, to the West Branch of Susquehanna; then, crossing the said River and running up the same, on the South side thereof, the several courses thereof, to the Fork of the same River, which lies nearest to a place on the River Ohio, called Kittanning, and from the said Fork, by a straight Line to Kittanning, aforesaid, and then down the said River Ohio, by the several Courses thereof, to where the Western Bounds of the said Province of Pennsylvania cross the same River; and then, with the said Western Bounds to the South Boundary thereof, and

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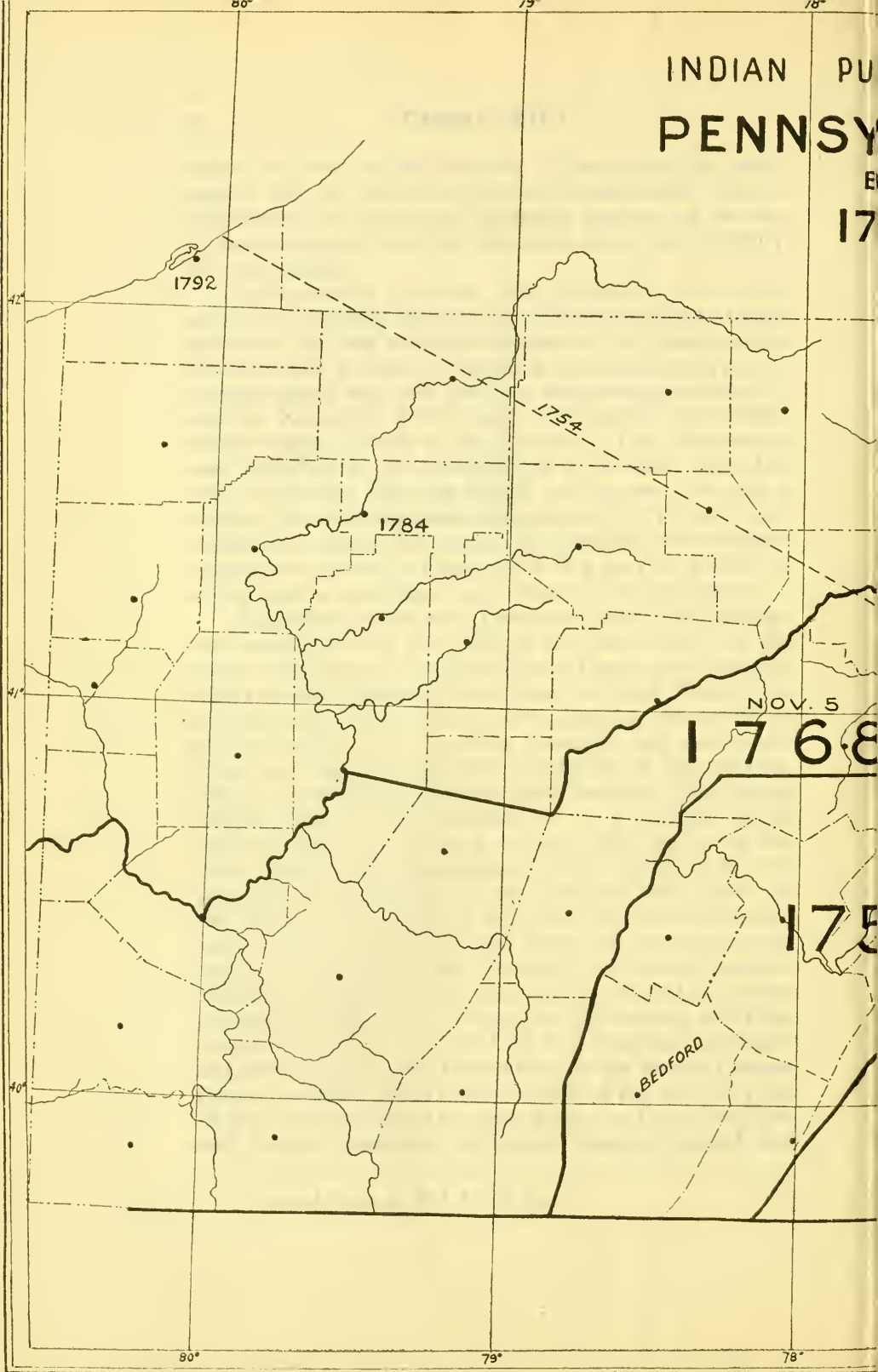
<sup>1</sup> Colonial Records, Vol. IX, p. 545.

INDIAN PENNSY

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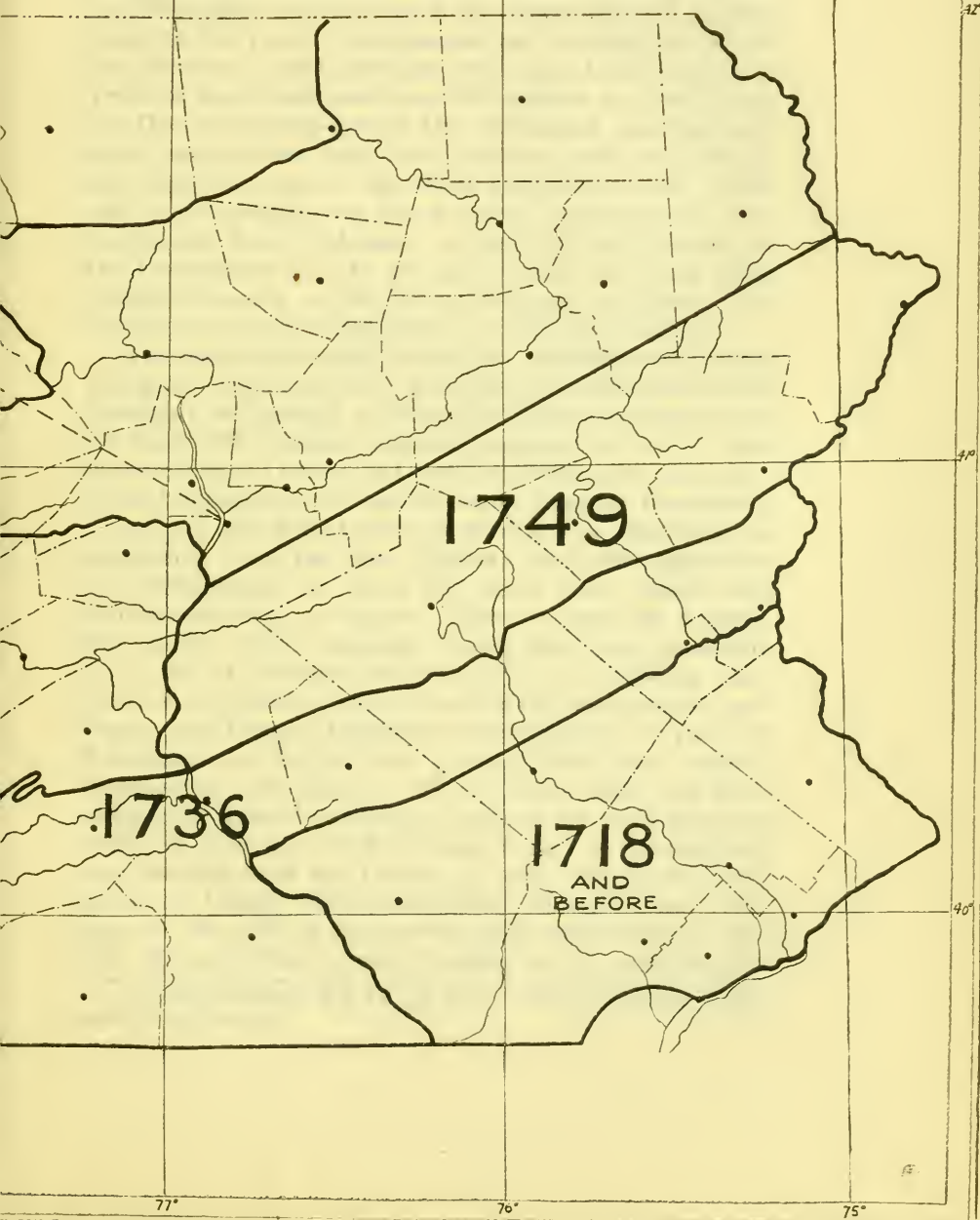


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with the South Boundary aforesaid, to the East side of the Alleghany Hills, and with the same Hills, on the East side of them, to the West Line of a Tract of Land purchased by the said Proprietaries from the Six Nation Indians, and confirmed by their Deed, bearing Date the twenty-third Day of October, one thousand seven hundred and fifty-eight; and then with the North Bounds of that Tract to the River Susquehanna, and crossing the River Susquehanna to the Northern Boundary Line of another Tract of Land purchased from the Indians, by Deed bearing Date the twenty-second Day of August, one thousand seven hundred and forty-nine; and then, with that Northern Boundary Line to the River Delaware, at the North side of the mouth of a Creek called Lechawacsein, then up the said River Delaware, on the West side thereof, to the Intersection of it by an East Line to be drawn from Owegy aforesaid, to the River Delaware, and then, with the East Line to the Beginning, at Owegy aforesaid.”<sup>1</sup>

The demands for land in this new territory were plainly going to be so large that, from the announcement to the Assembly on January 16, both the Surveyor-General and the Land Office began extensive preparations for it. Surveyor-General Lukens had been in office eight years, but he had apparently not needed many deputies heretofore. There had only been twenty-seven different appointments altogether, since the time Nicholas Scull was appointed for Philadelphia, in 1719, and these were usually for counties or parts of counties. Since the year Mr. Lukens had entered office Benjamin Parvin had been appointed for a part of Lancaster in 1761, while the following year Bartram Galbraith received a part of the same county, and Parvin and Thomas Lightfoot were appointed to parts of Lancaster and Berks, with a part of the latter county assigned to John Hartz. All of Cumberland had been assigned to John Armstrong in 1750, so six years after the treaty of 1758, by which so large a part of Cumberland was secured from the Indians, a large part of this was given to Deputy Surveyor-General Richard Tea. This was on the 20th of September, 1764, and included that part of Cumberland county bounded on the west by the

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<sup>1</sup> Colonial Records, Vol. IX, pp. 554-5. The space for the Indian name is left vacant.



Allegheny ridge, on the south by the Maryland line and on the east and north by certain "yellow lines" in a map annexed to Mr. Tea's commission, which map is lost, unfortunately, and no record of these "yellow lines" remains. This was probably the most important deputy's tract yet assigned, and afterward caused the most trouble, a set of difficulties which young Smith was called upon to untangle, as will be seen. William Maclay was assigned another part of Cumberland, and also the Surveyor-General's son, Charles Lukens, while William, Matthew and Archibald McClean had York county divided up between them, all in the same year, 1764. These were the last appointments before the announcement of the vast acquisition by the Governor, on January 16, 1769.<sup>1</sup>

Before going further, one other event that happened this month of January must be noted. This was the union of two scientific societies of Philadelphia into the present well-known American Philosophical Society, Independence Square, although it was practically an absorption of the "American Society" by the first-mentioned one. Charles Thomson, John Dickinson, John Lukens, Thomas Mifflin, David Rittenhouse and others of the "American Society" had been working at the union for over a year, and Dr. William Smith and others had been a committee from the other society to coöperate. With the union in January came the appointment of a committee on the 7th to observe the transit of Venus, which was predicted for the 3d of June following. Rev. John Ewing, Joseph Shippen, Jr., Esq., Rev. Dr. William Smith, Sur. Gen. John Lukens, and others, including David Rittenhouse, were chosen. Thomas Penn and Benjamin Franklin sent two telescopes from England and the Assembly voted £100 sterling for expenses. There were to be three parties, one at Philadelphia, one at Mr. Rittenhouse's residence at Norriton (Norristown) and one at Cape Henlopen. With Mr. Rittenhouse at Norriton were assigned Dr. Smith, Mr. Lukens and Hon. John Sellers, of the Assembly, Dr. Smith and Mr. Lukens going out together when the time came. The phenomenon was observed and reported to the Philosophical Society by Dr. Smith. The significance of the

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<sup>1</sup> Deputy Surveyors' Record Book, Department of Internal Affairs, Harrisburg.

event, however, in this connection, is the intimacy of Dr. Smith and Surveyor-General Lukens, shown by these incidents of January, 1769, and those which preceded them.<sup>1</sup>

On January 25 Governor Penn called the Board of the Land Office together at a special meeting at the Executive office. Mr. Hamilton, Secretary James Tilghman, Auditor-General Hockley, Receiver-General Physic and Surveyor-General Lukens were present and the final arrangements made for the opening of the Land Office for applications for tracts in the new territory. This settled, Surveyor-General Lukens perfected plans for at least a dozen Deputy Surveyors to be appointed, and in about two weeks, or on February 10, was ready to appoint his first one, namely, the young half-brother of the Provost of the College, who apparently had the year before joined him and his eldest son in erecting the second "Standing Stone" at the new town plot of Huntingdon.

Thomas Smith and his brother, Dr. Smith, appeared at the Land Office that day in Philadelphia and jointly gave bond to the amount of two hundred pounds, lawful money of the Province, for faithful performance of duty. This was done in the presence of Mr. Lukens and Lewis Farnier. His commission was made out at the same time by Mr. Lukens, and in it his territory was described as "bounded Eastward by a due north line to be run from the Head of Shaver's Creek to the West branch of Susquehanna, then up the branch and so far Westward that a strait line to be run Southward to the Laurel Hill may include all the waters that fall into the West branch of

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<sup>1</sup> A letter from Dr. Smith, of so late a date as February 8, 1774, to Arthur St. Clair, at Ligonier, Westmoreland county, shows that the doctor not only knew how to find places for his brother, but also for his friends. "At the breaking up of the Assembly, Capt. Thomson went to the Governor and got the promise of Mr. McCrea's district to be added to his own. Mr. Woods, hearing of this, got his friends to represent to the Governor that he had the first promise from Mr. Lukens. Mr. Shippen and I likewise told the Governor that you had the first promise during Richard Penn's administration, and the Governor then declared that if you had the first promise, no one else should have it, for that there was no person he would sooner oblige than you. But, on the whole, as these matters were before he came in as Governor the last time, he left Mr. Lukens to declare who was the first applier to him and to act accordingly."—"The St. Clair Papers," by William Henry Smith, Vol. I, p. 283, 1882.

Susquehanna, then along the Laurel Hill and from the same to the Alligheny Mountains still including the said waters, then along the said Mountains to that part thereof that would be intersected by the line of the new purchase, then last by Richard Tea's district to the first mentioned boundary." This was his first district, and, as will be seen from the map, was almost in the middle of the vast new oblong tract stretching diagonally across the State. It included about half of the present county of Clearfield, a large part of Center and Cambria and parts of Huntingdon, Blair and Indiana—all of which was then in Cumberland county.

On the same day, also, he received from Thomas and Richard Penn, the proprietors, by whose consent he was appointed, full instructions for which he gave the above bond for faithful performance. After an introductory paragraph regarding his appointment and territory, these directions continue:

"Now know that for your better guidance and direction in the execution of the said commission, we have thought fit to enjoin the following Instructions for your observation.

"I. You shall faithfully execute every such warrant as shall be directed to you to the best of your skill, knowledge and understanding according to the express words and order of such warrants, and no otherwise without special leave first hand from us for your so doing.

"II. You shall not execute any warrant upon any Surveyed Lands or Manors, or reputed Manor Lands, or on any other land appropriated to our use by any former survey unless such lands be expressly mentioned in your Warrant.

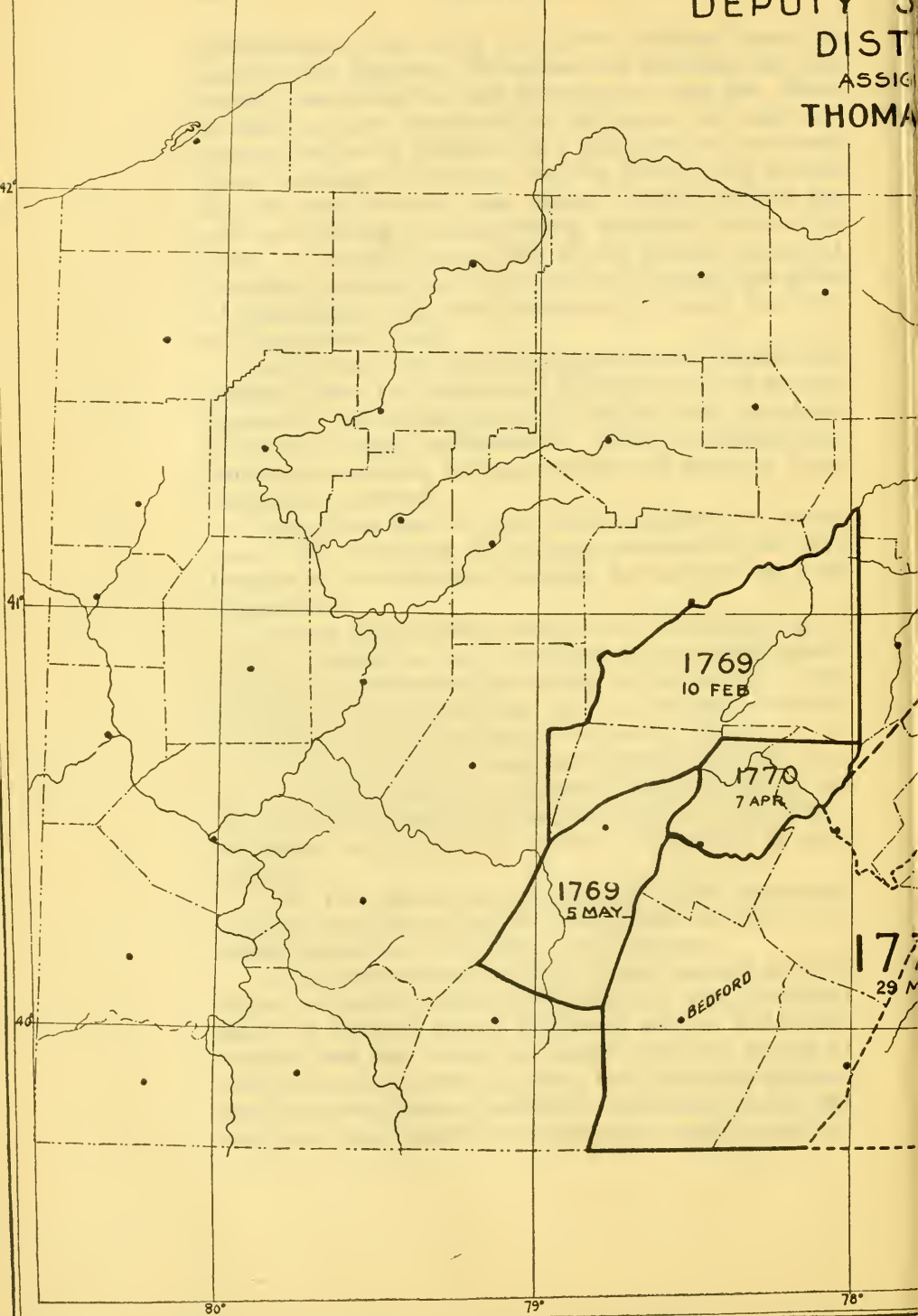
"III. You shall lay out all Lands as regular and nearly contiguous as the places will bear, admit, or allow of,—unless directed by ye warrant to the contrary.

"IV. You shall make returns of every warrant into the Surveyor-General's office at Philadelphia with portraited figures of the land exactly performed and the Field work annexed and that within six months after the receipt of such warrants, or order of survey, but if anything happens that the survey cannot possibly be performed within that time, you shall transmit an account in writing into the

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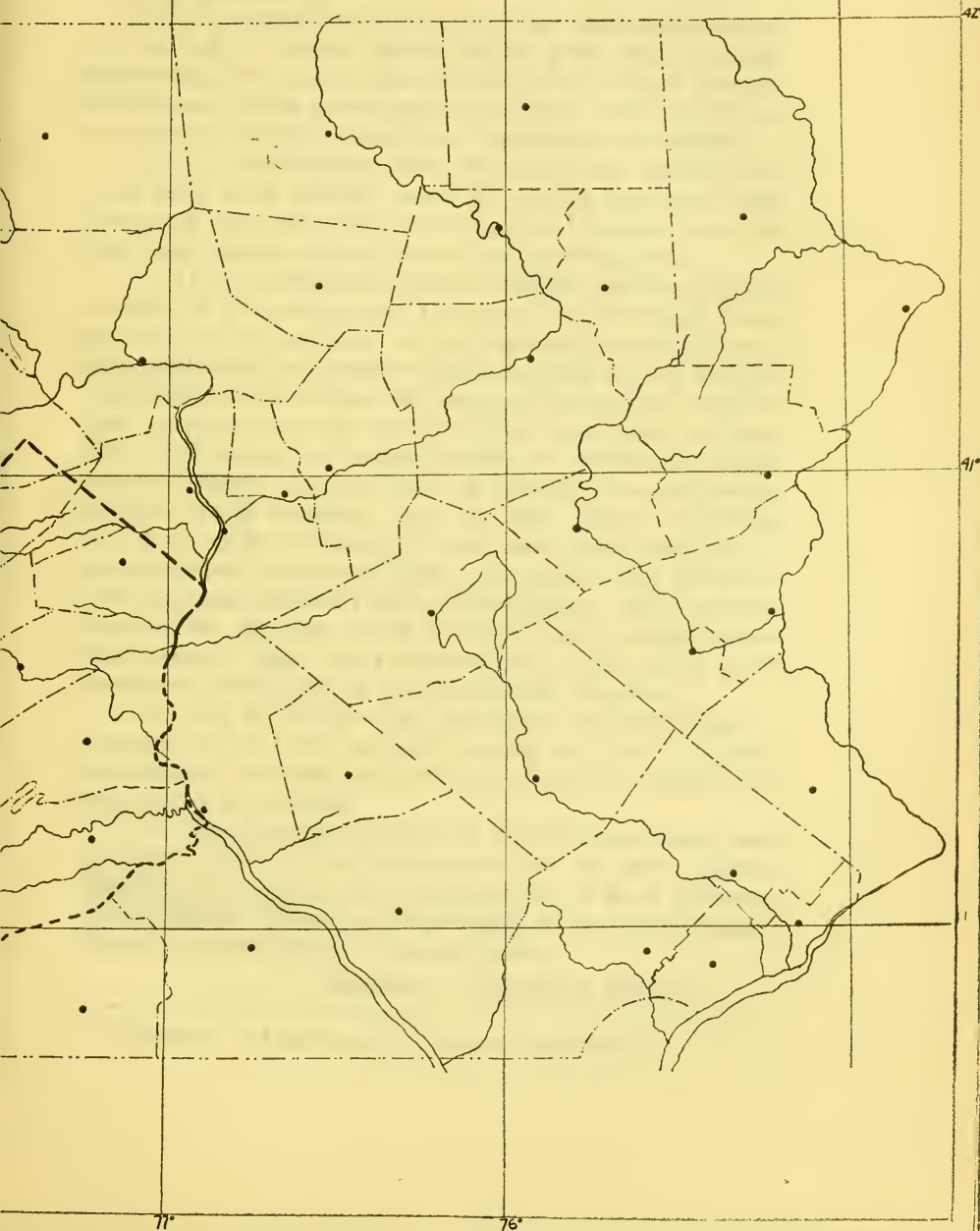


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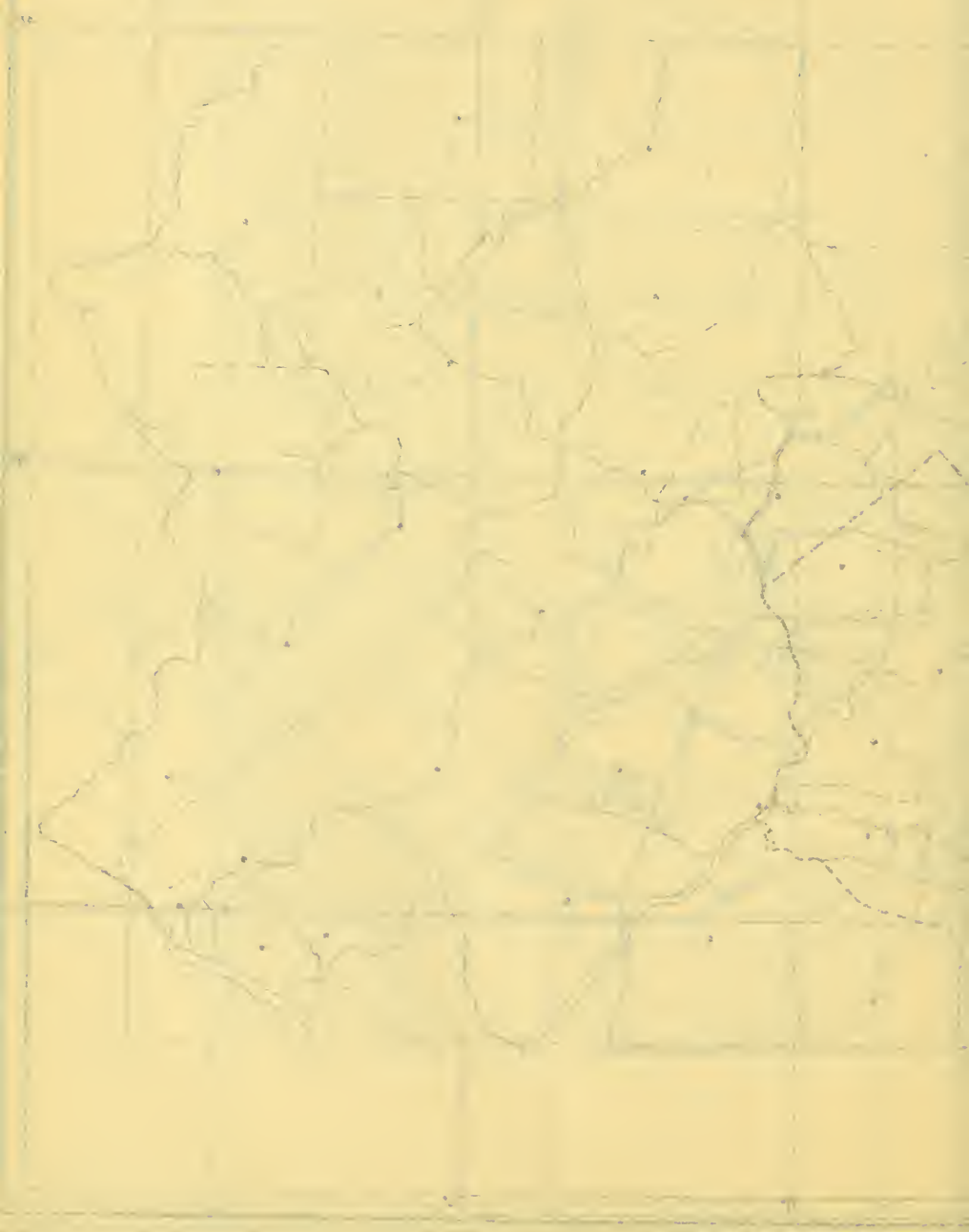




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Surveyor General's office containing the reasons for such delay.

"V. You shall not deliver unto any person whatever any Draught, Plot or Field works of his lands before your return be made into the Surveyor General's office and there be allowed of.

"VI. You shall not make use of any chain-carriers but such as are of known honesty and of good repute among their neighbors, which chain-carriers shall take a solemn attestation before some magistrate justly and exactly to execute their trust without favor, partiality or affection.

"VII. You shall not make returns of any surveys but what hath been actually made by you on the spot—and you shall take care that all outlines and bounds shall be fairly and visibly marked before you quit the field.

"VIII. You shall keep fair and regular entries in order of time of all surveys and resurveys by you made from time to time in pursuance of any warrant or order of survey which you shall receive with a draught or plot thereof and Field works annexed in Books to be kept by you for that purpose, and our surveyor shall from time to time have free access to the said Books of entries and other papers relating to your office as Deputy Surveyor when he shall think necessary, and the said Books of entries and other papers relating to your said office shall be by you (or those into whose hands your papers may fall after your decease) delivered up into the hands of our Surveyor General for the time being or such other person as we shall appoint when you (or those into whose hands your papers may fall) shall be by us thereunto required.

"IX. Out of all fees that you receive for surveying or resurveying of lands or lotts during the force of your commission, you shall pay unto our Surveyor General the full third part thereof.

"For the true performance of which Instructions you shall give Bond to us with security in the sum of Two Hundred pounds and sign a counterpart of these presents by Indenture. Signed at Philadelphia by the said Thomas Smith the tenth day of February, 1769.

(SIGNED) "THOMAS SMITH."<sup>1</sup>

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<sup>1</sup> Records of Department of Interior, Harrisburg.

The explicit and exhaustive directions given to Mr. Smith in these instructions and those that follow were the result of long experience in the Land Office, some of which, especially in the case of Richard Tea, were even then in the minds of its officers, as may be seen further on. Mr. Lukens on the same day handed Mr. Smith additional instructions, and as they were, for the most part, the models used for all the rest of the numerous deputies appointed that year and figure largely in the land law of the State, they acquire a more than ordinary importance. They must also be regarded as a part of that increasingly interesting tale of the first plotting of our American lands.<sup>1</sup>

"In consequence of sundry letters received from the Hon<sup>ble</sup> the proprietaries," read these additional instructions, "and the new regulations in the Land Office, you are to observe the following Rules & orders in surveying all lands in this province, as a part of your Instructions.

"1<sup>st</sup>. You shall survey for the use of the Hon<sup>ble</sup> the proprietaries in regular figures generally one tenth of all lands or 500 As out of every 5000 as that you shall survey and make return thereof for their use on a Warrant dated the 13<sup>th</sup> of October, 1760.

"2<sup>ndly</sup>. By their direction & order you are not to survey on any one warrant more land than ten per cent over and above the quantity mentioned in such Warrant with the usual allowance of six per cent and this rule you are to observe in respect to all past warrants, not yet executed as near as reasonably may be.

"3<sup>rdly</sup>. You are not to survey any of the proprietaries vacant or unappropriated lands whatever on any ticket or order from any person but the Surveyor General nor unless you have a copy of a regular warrant or application numbered and to you directed by the Surveyor General himself, or his order.

"4<sup>thly</sup>. You shall lay out all Lands that adjoin Rivers or large Creeks at least three times the length from the river or creek as they are laid in breadth on said river or creek, so that each purchaser may have a proportionable

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<sup>1</sup>"Huston on Land Titles in Pennsylvania." The author, after speaking of Thomas Smith's instructions on page 305, says, these are "additional instructions to Thomas Smith," which contain certain features found in no other directions to deputy surveyors.

front on the water, provided the ground will in any wise admit of it, and to lay out all lands, contiguous & as regular as possible, and you are to give at least ten days notice in each township in your district by fixing up advertisement or otherwise in one or more of the public places therein signifying at what time you will attend in that township to execute new applications for all lands there requesting all persons concerned to attend and provide to have their business completed.

“5<sup>thly</sup>. You shall execute every application to you directed & make return thereof into the Surveyor General’s office within six months after the date of such applications, provided the person who shall obtain the same or some other person in his behalf will attend and show the land to be surveyed & pay for surveying the same as soon as completed, but in case the applyer or some person for him or her do not show the land and also pay the fees for surveying as soon as the same is done, or any other reasonable cause shall oblige you to delay the execution thereof, you shall enter your reasons for not performing the same on the back of copies of such applications & transmit an account thereof to the Surveyor-General with all convenient speed. And you may observe, by the regulation proposed in the Land Office, that much will depend on the care & dispatch of the Deputy Surveyor, and I desire the people may not have any cause of complaint of your neglecting their business.

“Given under my hand at Philadelphia the tenth day of February Anno Domini 1769

“JN<sup>O</sup> LUKENS S. G.

“N. B. You are to give some  
name to each survey you  
shall return to my office.

“JN<sup>O</sup> LUKENS, S. G.”

With these instructions of the 10th of February, 1769, Thomas Smith was a fully fledged Deputy Surveyor, and with his transit and chain ready to go to headquarters in or near his territory. Three days later, John Biddle was assigned territory on the Delaware river part of the purchase, and in five days Joshua Elder received an assignment

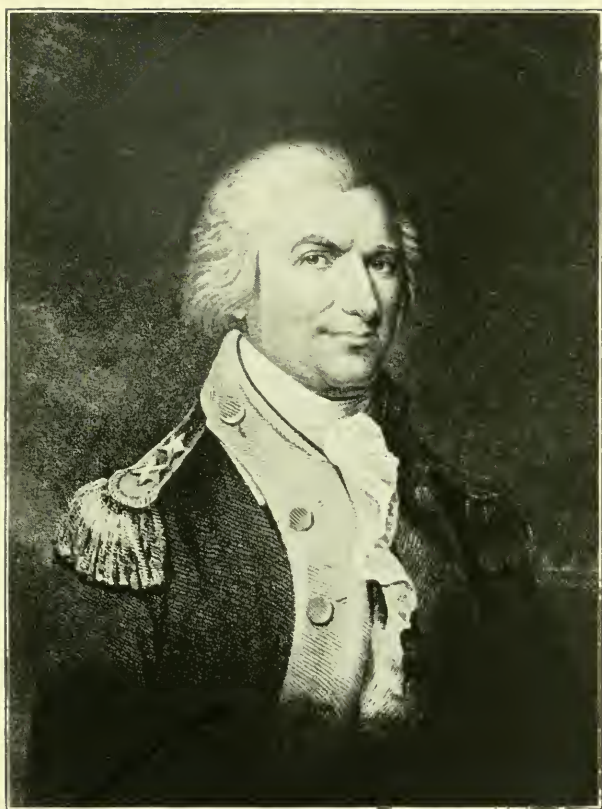
adjoining Smith's on the west, while on the 18th territory corresponding somewhat to our present Westmoreland county, south of the Forbes road, was given to William Thompson; that north of the road to Robert McCrea, and that west of the Monongahela to James Hendricks. The next appointment was on March 31, by which Charles Stewart received territory in the northeastern part of the purchase.

Two months had not yet passed, but Thomas Smith had made so good an impression, or else his decision to make his headquarters at Fort Bedford suggested so much convenience in it, that on May 5 the Surveyor-General made a considerable and important addition to his territory of all south of his first tract, between the Laurel Hill and Allegheny Mountains to Forbes' road. This was the only district altered. Fifteen days later, all south of that between these mountains was assigned to the McCleans—Archibald, Jr., Moses and Alexander—while two days after this, namely, the 22d, the Surveyor-General gave his eldest son, Charles Lukens, a tract adjoining Thomas Smith's first territory on the east, in the present Bellefonte region. On the 1st and 30th of June the rest of the northern part of old Cumberland and a section of it near the Susquehanna, given, respectively, to William Maclay and Jasper Scull, closed the apportionments for nearly a year, or until it became necessary to remove Richard Tea for irregularities in his big tract to the east of those of Smith and the McCleans.<sup>1</sup>

This was done in April, 1770, after Thomas Smith had been at work with his transit and chain for but a little over a year. On the 5th, Mr. Lukens assigned the most of it to Lieutenant Arthur St. Clair, of the Ligonier Valley, who was becoming a warm friend of Deputy Surveyor Smith, while two days later the latter received that part adjoining his own territory and west of Shaver's Creek and the Franks Town branch of the Juniata river. This latter covered a large part of what is now Blair county and a part of Huntingdon, making his assignment include, with these, about a third of Center county, a half of Clearfield, all of Cambria, a third of Somerset and a part of Indiana. This

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<sup>1</sup> Richard Tea seems to have been incompetent or careless, or both. His surveys caused considerable litigation.



ARTHUR ST. CLAIR

Half-tone of the Wellmore engraving from a drawing by  
J. B. Longacre, after the portrait by C. W. Peale





large assignment was all covered by his first commission and bond of February 10, 1769, when he started for his headquarters out in Forbes' road, at the beautiful settlement of Bedford, only a few miles from the southernmost point of his territory.

Before taking a glance at this settlement, Bedford, which was to become Surveyor Smith's home for so many years, it will be of interest to note one of the results of the past years' work that appeared at the same time this Frankstown territory was assigned him. On April 4 of this year, 1770, there was issued at Philadelphia a new map of the Province, made by William Scull. "The cheerful Assistance afforded me in this Work," says Mr. Scull, on the upper right-hand margin of it, "by the several Deputy Surveyors of this Province & by other Gentlemen, demands my Grateful Acknowledgements; and I take this Opportunity of Returning my Thanks, to Joseph Shippen, Jr., Esq<sup>r</sup>, Provincial Secretary, John Lukens, Esq<sup>r</sup> Surv: Gen:; Mr Benjamin Lightfoot, Mess<sup>rs</sup> Maclay, Thompson, Hendricks, McKinney, T. Smith, Jesse Lukens, S. Wallis, Tea, Stewart, McClean, and Elder, for the several Draughts and Observations they furnish'd me with; which have enabled me to present the Publick with an Accurate Map, not only of the improved Parts of the Province of Pennsylvania, but also of its extensive Frontiers, never before laid down with any certainty, or Resemblance to Truth—the Western Line dividing the Province of Pennsylvania and Maryland run by Mess<sup>rs</sup> Mason and Dixon, and the County Lines run by Mess<sup>rs</sup> Maclay, Biddle and myself, have been of Great Use to me, on this Occasion." "The whole line run by Mess<sup>rs</sup> Mason & Dixon is delineated in this Map," he says on the lower left-hand margin, "but, considered as a boundary, that line should have been extended no farther West than somewhere about the Line A B or the true Meridian of the 1st Fountain of Potomack, which is the Western boundary of Maryland. Pennsylvania by the Royal Grant, is thus entitled to run due South by the Line A B for about 50 miles to the Beginning of the 40th Degree and then West to the end of 5 Degrees from Delaware." This map, which is here reproduced, will repay careful study at this point, as giving the best idea of the best current conception of the known and unknown parts of the Province in 1770. It

will also show the peculiar importance of the region along the Forbes road and its leading frontier settlement, Bedford, which he made his home.

Bedford, in the passes made by the Juniata, was a post of a trader with the Indians, a Scotchman named McRae, or, as it was generally spelled, Ray, as early as 1750 (the date of the creation of Cumberland county), and the place took the name Ray's Town. About two years later it is known by the name of another settler, Garrett Pendergrass, also a Scotch trader with the Indians, whom the natives drove out in 1755. At this time Colonel James Burd, with about 300 men, built a road from Carlisle to the place. By 1757 it became evident that it was such a natural half-way house to the forks of the Ohio that it should be fortified. By August, 1758, Colonel Forbes' army reached here and began his celebrated road from there to Fort Du Quesne. On the 18th of March, 1759, at Forbes' death, General Stanwix succeeded him in headquarters at the camp at Fort Bedford, named in the Duke of Bedford's honor. With the army came many of the Scotch-Irish Presbyterians and Germans from the Cumberland Valley and settled about the fort, and it became the military supply depot between Carlisle and Pittsburg. In 1761, the year he was appointed Surveyor-General, Lukens had his deputy, John Armstrong, lay out a proprietary manor of 2,810 acres, covering the site of the settlement. The settlement bore the brunt of the Indian troubles, but after the peace of 1765 the Board of Property on May 5, 1766, ordered a town of 200 lots to be laid out by the Surveyor-General, who completed his work in June. On the plan of the town Bernard Dougherty, Robert Galbreath, Thomas Smith, George Woods and one woman, Phoebe Wolf, are mentioned as lot owners, but it does not appear at what date they purchased. These are the men, however, with whom the young Deputy Surveyor, Thomas Smith, was closely associated for years to come.<sup>1</sup>

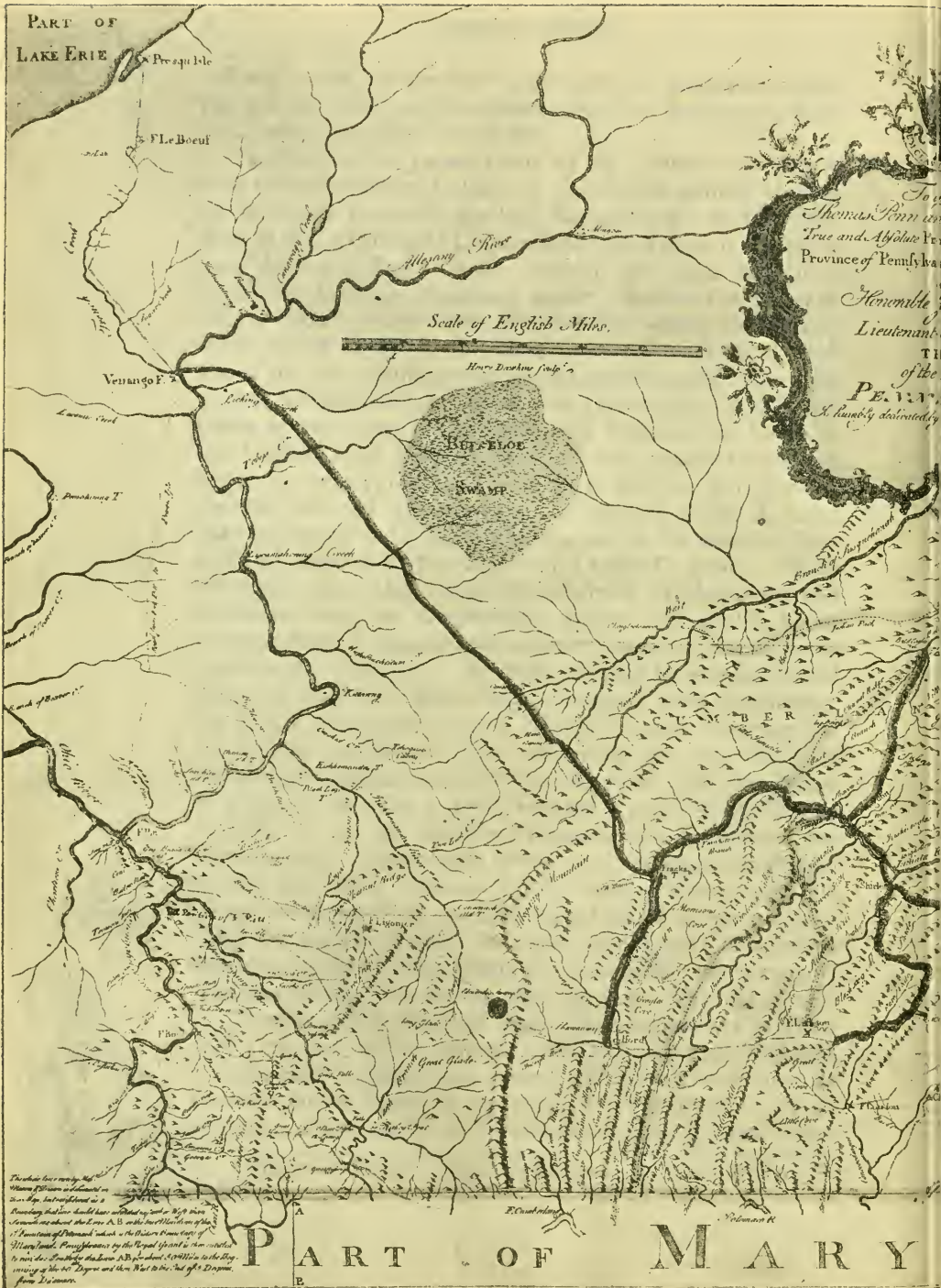
Thomas Smith had not made his headquarters at Bedford very long before James Smith, a young man who had a remarkably adventurous career, and was later known as Colonel James Smith, a signer of the Declaration, led an escapade which captured Fort Bedford, and he used after-

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<sup>1</sup> Historical Reminiscences of Bedford, by Hon. William P. Schell.



PART OF  
LAKE ERIE



To  
Thomas Penn  
True and Affectionate  
Province of Pennsylvania  
Honorable  
Lieutenant  
of the  
PENNSYLVANIA  
It humbly dedicated

These lines are surveyed by the  
Surveyors of the Province of Pennsylvania  
in the year 1763. and are intended as a  
boundary between the lands of the Crown  
and the lands of the Proprietors of the  
Province of Pennsylvania. and as the  
Province of Pennsylvania is the  
Province of the Crown of Great Britain  
and as the Province of Pennsylvania is  
the Province of the Crown of Great Britain  
and as the Province of Pennsylvania is  
the Province of the Crown of Great Britain  
from the Crown.

PART OF MARY









ward to boast that this affair in 1769 was the first capture of a British fort by the Americans. Colonel James Smith, while afterward frequently associated with Thomas, was in no way related to him. This escapade, however, was nothing more than an ebullition of youthful spirits in a rapidly growing frontier settlement of which Bedford was the head. Claims were rapidly taken up, and the Deputy Surveyors all through this region were well occupied. By the time Mr. Smith had been surveying two years there was such a demand for a county seat nearer than Carlisle that the Government responded to it, and on March 9, 1771, a new county was carved out of Cumberland, bearing the name of its new county seat, Bedford.

A glance at the bounds of the new county will show that Cumberland, while, of course, far larger than at present, was a very medium county in size, and Bedford had become the vast one, covering about half of the Province. "Beginning where the province line crosses the Tuscarora mountains," says the act, "and running along the summit of that mountain to the Gap near the head of Path Valley; thence with a north line to the Juniata; thence with the Juniata to the mouth of Shaver's Creek; thence northeast to the line of Berks county; thence along the Berks county line northwestward to the western bounds of the province; thence southward, according to the several courses of the western boundary of the province, to the southwest corner of the province; and from thence eastward with the southern line of the province to the place of beginning." This was to be the vast new county of Bedford. It will be seen that it apparently accepted one of the theories of the western boundary, which held that it should be five degrees from each part of the Delaware, and consequently follow a general course similar to that of the eastern boundary. It also shows that the Berks county line had never been run and its intersection with the boundary was unknown.

A commission, composed of Lieutenant St. Clair and Bernard Dougherty, "Esquires," and William Proctor and George Woods, "Gentlemen," were made trustees to buy a site and erect upon it a court house and prison. The former they secured on November 13 of that year on the *northeast* corner of what is now the public square, and tradition says that log structures were erected on this site,

for use during preparations for the building of the stone court house and prison, which was built in 1774 on the northwest corner, the predecessor of the present temple of justice on the southwest corner. Robert Hanna, Dorsey Pentecost and John Stephenson were appointed County Commissioners, and Samuel Davidson was made County Treasurer, while Lieutenant Arthur St. Clair became Prothonotary and Clerk of the several courts, in preparation for which, as shall be seen, he resigned his post as Deputy Surveyor of Richard Tea's old district soon after the act creating the county was passed, on March 9. By April 16 the several "Justices of Our Lord the King," William Proctor, Jr., Robert Cluggage, Robert Hanna, George Wilson, William Locheny and William McConnell, Esquires, who had been commissioned on the 12th instant, held their first court at the inn of Henry Wertz. Here Bernard Dougherty moved that the lawyer Robert Magaw, of Carlisle, be admitted, and he took the required oath, after which Mr. Magaw moved the admission of Andrew Ross, Robert Galbraith, Phillip Pendleton, David Sample and James Wilson, all of whom became the first Bedford county lawyers—a scene with which, if Thomas Smith were present, he must have been greatly impressed. Those familiar with the history of that region readily recognize these men as residents of widely separated parts of Central and Western Pennsylvania, while the officers of the county were representative of every settled part of the vast territory comprised in this new county.

Knowing that his friend, St. Clair,<sup>1</sup> was to resign his district, Mr. Smith was soon informed that he was to succeed him, and twenty days after the act was passed he was appointed by Mr. Lukens "to be Surveyor of the western part of the county of Cumberland and part of the county of Bedford, formerly the district of Richard Tea." His

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<sup>1</sup> Arthur St. Clair was born in 1734, the day or month not being known, according to the editor of his Letters, William Henry Smith. His father was a younger son and died young. His mother educated him at the University of Edinburgh, and he studied medicine under Dr. William Hunter, of London. In 1757 he became ensign of the Sixtieth or Royal American Regiment, and was with Amherst at Louisburg in 1758. He was made a Lieutenant in 1759, and was at Quebec. He married a half-niece of Gov. James Bowdoin at Boston, and in 1762 resigned his commission and lived first at Bedford about 1764, and soon settled in the Ligonier Valley.

PENNS

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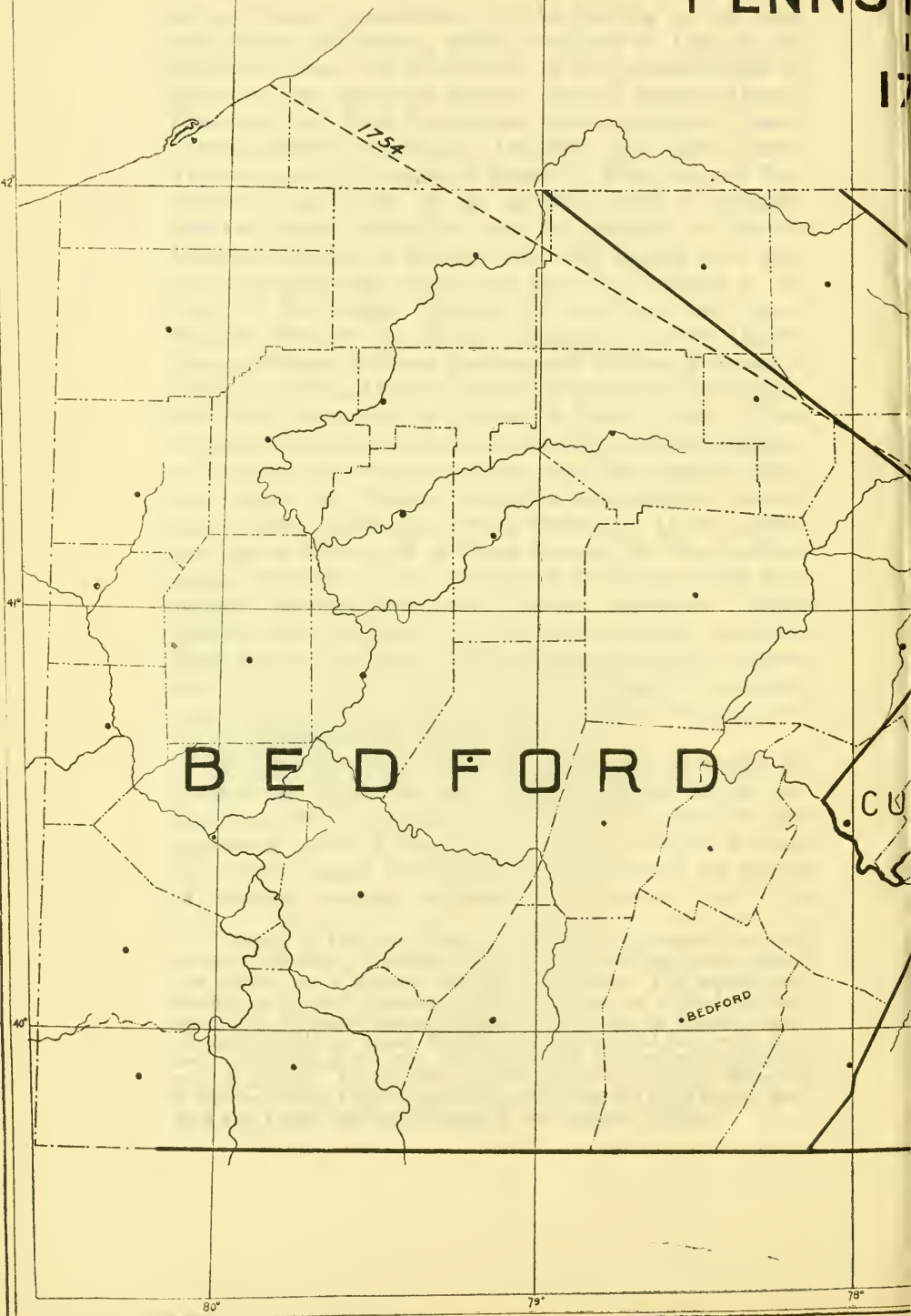


B E D F O R D

• BEDFORD

PENNSY

17



ANIA









instructions were practically the same as previously given, but he was required to give a new bond for five hundred pounds, which he did, with Dr. Smith and David Franks, another Surveyor, as his security. This was signed by himself and them in the presence of Andrew Hamilton and John Little at Philadelphia. It is not clear whether this was an addition to his previous territory or not. No other deputy was appointed for a year and a half afterward, which would incline to the belief that it was an addition, which, if true, would make him probably the most important Deputy Surveyor in the Province, with his home, Bedford, in the midst of his territory. He was now to have another two years of uninterrupted work as a Deputy Surveyor before any striking new development was to occur. He was rapidly impressing his associates, not merely by his ability and far-seeing wisdom as Surveyor, but as a character of unusual independence and strength, and as a man of education and culture, whose earnest, strenuous and conscientious endeavor marked him as one fitted for wise leadership among them and a prominent part in larger affairs. "Fewer controversies," wrote Justice Thomas Duncan, of the Supreme Court, in 1824, "have arisen on surveys made by that most excellent man and fine officer, than have occurred in the case of any other Deputy Surveyor."<sup>1</sup>

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<sup>1</sup> McDowell v. Young, 12 S. & R., 130.

#### IV

### HE COMBINES THE DUTIES OF LAWYER, PROTHONOTARY, CLERK, RECORDER AND JUSTICE WITH THAT OF SURVEYOR

1772

Thomas Smith fully realized that surveying, carried on in the wholesale manner that follows the opening of new territory to settlement, was to be more or less of a stepping-stone occupation to him, as it was to Washington himself. Just how early he thought of a permanent life-work, and especially of the law as a profession, is, unfortunately, unknown. But that he had the best of advice in regard to it there can be no manner of doubt. Both his own and Dr. Smith's letters show that he looked after the latter's lands, and that in itself would imply that he prepared himself to do it properly. Meanwhile, too, it should be remembered that where the courts themselves were held by Justices of the Peace unlearned in the law, the entry to that profession was often so easy as to be very attractive to frontier men of affairs like St. Clair, George Woods, Galbraith and others on whom chiefly civil life seemed to rest. But Thomas Smith was a thoroughly learned lawyer, and soon proved it by rising to the top among his associates at an early day. It has been said that he studied in Philadelphia, though there appears to be no proof of it, while it is certain that he was carefully studying the law, under some one's direction, during his surveyor days, and that, too, before January, 1772. That he may have, would be in thorough keeping not only with his life-long habits of industry, but his habits as an independent student as well, and that he would of necessity give most attention to land law is evident from the nature of his work and the situation on the frontier.

It will be recalled that the first court held at Bedford

was the April term, 1771, in which, on the 16th, Robert Magaw, Andrew Ross, Robert Galbraith, Phillip Pendleton, David Sample and James Wilson were admitted as attorneys. Wilson had the first case, and he and Galbraith had most of the work during that year. Wilson was located at Carlisle, and even then showed the ability which was to make him probably the greatest expounder of the constitution, which he helped to make, in his day, and raised him to the greatest supreme bench in the world. Sample and Magaw had a number of cases during the year, too, and after David Grier, David Espy and George Brent were admitted, at the July term, they, too, had a few cases. There seems to have been but one other admission that year, namely, James Berwick, and none thereafter until July, 1773; at least, no record was made of them if there were.

At the January term of 1772, however, a case came before the court in which Wilson and "Smith" appear against Sample and Galbraith. This docket therefore shows that "Smith" began practice, even though no record of his admission appears in these dockets or elsewhere.<sup>1</sup> Now, were this the sole record of his first case, it might be uncertain whether, as in another interesting record at Carlisle, which will be noted later, this "Smith" might not be James Smith, a prominent fellow-lawyer of Wilson at Carlisle and York. The matter is settled, however, by the private docket of Thomas Smith's practice at Bedford, which also places his practice as beginning at this time.<sup>2</sup> The fact that he should appear so much with James Wilson raises the query whether or not he may not have studied with the man who was to open the first law school in Pennsylvania. This private docket is a home-made one, as private record books frequently were in those days, and contains his cases from 1772 to 1782 at Bedford. This year's practice at Bedford, however, shows that George Woods, another Surveyor, appears, and there is no record of his admission. Wilson, Galbraith and Espy have the largest share of the practice. At the April term Smith appears with Wilson and Hamilton, against Galbraith and

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<sup>1</sup> Common Pleas Docket, No. 1, Bedford, Pa.

<sup>2</sup> This docket is in the possession of C. P. Humrich, Esq., of Carlisle.

Berwick, and also with Espy, Galbraith, Woods and Hamilton, against Wilson, Duncan and Riddle. He also has a case with Wilson at the July term, and his name is evidently written on the docket by himself, and likewise at the October term, where he and Espy appear against Sample in an ejectment case. Espy conducts another case, this time against Smith, Wilson and Galbraith, and Smith, Berwick and Sample have one against Wilson, Espy and Galbraith. These are the only cases during this year in which he appears. In some of them, however, he may have entered the case later, as the record is a continuance docket.

This practice at Bedford or elsewhere, if he had other cases, in no way affected his work as a surveyor, for he is known to have continued in that position under Mr. Lukens until December, 1774, at least, and is believed to have served even longer. He was leading a remarkably strenuous life at this time, with the growing work of a rapidly increasing population, but, busy as he was, he undertook still more, and that, too, without resigning his work as Surveyor, as Lieutenant St. Clair did when he became Prothonotary, Clerk and Recorder at Bedford in 1771.

The increasing population on the North Branch of the Susquehanna had demanded a new county, and it was granted March 21, 1772, and given the name Northumberland.<sup>1</sup> This had but little influence on the extensive

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<sup>1</sup> This was at the petition of inhabitants of Berks and Bedford counties. The boundaries were as follows: "Beginning at the mouth of Mahontongo Creek, on the West Side of the Susquehanna; thence up the South Side of Said Creek, by the several courses thereof, to the head at Robert Mateer's Spring; thence West by North to the Top of Tussey's Mountain; thence South-westerly, along the Summit of the Mountain to Little Juniata; thence up the Northeasterly side of the Main Branch of Little Juniata to the Head thereof; thence North to the Line of Berks county; thence Northwest, along the said Line, to the extremity of the Province; thence East, along the North Boundary, to that Part thereof, which is due North from the most Northern Part of the Great Swamp; thence South to the most Northern Part of the Swamp aforesaid; thence with a Straight Line to the Head of the Lehigh, or Middle Creek; thence down the said Creek so far, that a line run West-Southwest will strike the Forks of Mahontongo Creek, where Pine Creek falls into the same, at the place called Spread Eagle, on the East Side of Susquehanna; thence down the Southerly Side of said Creek to the River aforesaid; thence down and across the River to the Place of Beginning."

boundaries of Bedford county, but late in that year and early in 1773 the increased population about the forks of the Ohio, and especially the influx of settlers from Virginia, led to a demand for a county seat nearer than Bedford. This demand was well understood by St. Clair, who was a Judge of the court at Bedford at the January term, when Wilson, Smith and Espy appeared in a case against Galbraith, Ross, Magaw and Woods. St. Clair and Smith were both in close touch with the Provincial government at Philadelphia, and were correspondents who kept the Governor informed on conditions in the West.

The act creating the new county was passed February 26, 1773, and it gave all territory surrounded by the great branch of the Youghiogeny, the Laurel Hill, the ridge of the Allegheny and the ridge separating the Allegheny waters from the Susquehanna waters to the purchase line at the head of the Susquehanna a west line from these to the western boundary, and the last-mentioned and southern boundaries, to be called Westmoreland county. This took off not quite a third of Bedford, and left the latter for the next eight years, or nearly the whole period of the Revolution, a large but irregular county in two parts, held together by a narrow strip of between twenty and thirty miles width in the present counties of Blair and Cambria.

On the following day, February 27, the Governor made out commissions to officers of the old and the new county; for Lieutenant St. Clair was, at his own request, made Prothonotary of the new county, with Mr. Hanna's house beyond Ligonier, just above the present site of Greensburg, as county seat, and Thomas Smith was again made his successor, this time assuming the added duties of Prothonotary, Clerk and Recorder at Bedford.<sup>1</sup> As it took some time for these papers to reach their destination, it was the 20th of March before Lieutenant St. Clair recorded his last deed and the 26th before Surveyor Smith recorded his first one. Justice St. Clair still served as a Judge of the court at the April term at which Prothonotary Smith began acting as

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<sup>1</sup> Thomas Smith was appointed not only to the several offices of Prothonotary, Clerk of Common Pleas, Register of the Orphans' Court and Recorder of Deeds on the 27th, but also, as Justice of the Peace, and consequently a member of the court. St. Clair was made a Justice of the Peace and member of the courts of both counties that same day. Colonial Records, Vol. X, p. 78.



Clerk. His records are far more full and modern than those of his predecessor. At this term Galbraith, Wilson, Espy and Magaw had the chief practice, although Ross, Brent, Berwick and Sample had some cases, too. Smith appears in two cases in the July and October terms and the January term of 1774.

On May 11, 1773, Benjamin Chew, Register-General for Pennsylvania, made out a commission to Prothonotary Smith as Deputy Register of Wills for Bedford county, and Mr. Smith had furnished a bond for £500, with County Commissioner Bernard Dougherty and Attorney Robert Galbraith as sureties, but for some reason it does not seem to have been recorded until March 10, 1774. This was followed on May 3 by his oath of office as Justice of the Peace, with which office he seems to have absorbed a large part of the government of Bedford county.<sup>1</sup> A man who could thus become Surveyor, Lawyer, Prothonotary, Clerk, Recorder and Deputy Register of Wills as well as Justice of the Peace for this important military post and frontier county seat of Bedford, in a residence of about five years, was already a man of dominant influence in the affairs of not only the county, but the whole western part of the Province. It would also make him, in a peculiar sense, a representative of the Provincial government at Philadelphia in the impending crises, which were already showing their first signs in this region. All this would tend to strengthen his natural tendency to a conservative, wise and careful course. His high character, his earnest and intense life of industry, as well as his education and natural ability, had made him a wise and respected leader of broad, yet conservative, views.

These activities, added to his previous preparation and constant study of the law, were well calculated to give him a still wider knowledge of the law, and particularly land law, in which so large a part of the litigation of the frontier

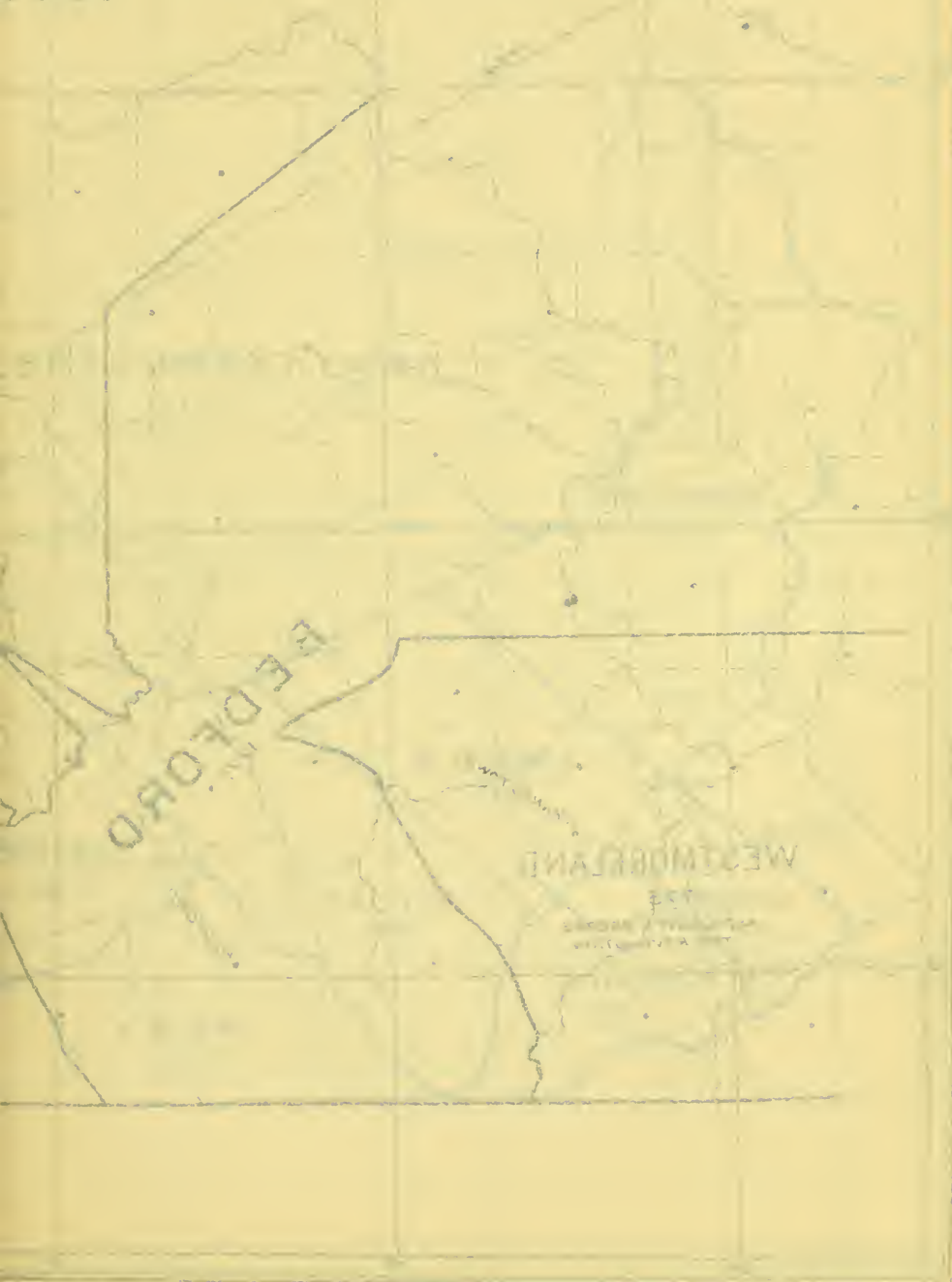
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<sup>1</sup> His commission, with those of others, was made out by the Governor in Council, April 9, 1774, and a *dedimus potestatem* issued to Bernard Dougherty and himself. The following are the Bedford Justices: Bernard Dougherty, Arthur St. Clair, William Proctor, Jr., Robert Cluggage, George Woods, Abraham Keble, Thomas Smith, Thomas Coulter, John Piper, Elias Stillwell, Abraham Miley, Richard Hogland, Samuel Davidson, Henry Lloyd and William Latta. Colonial Records, Vol. X, p. 163.



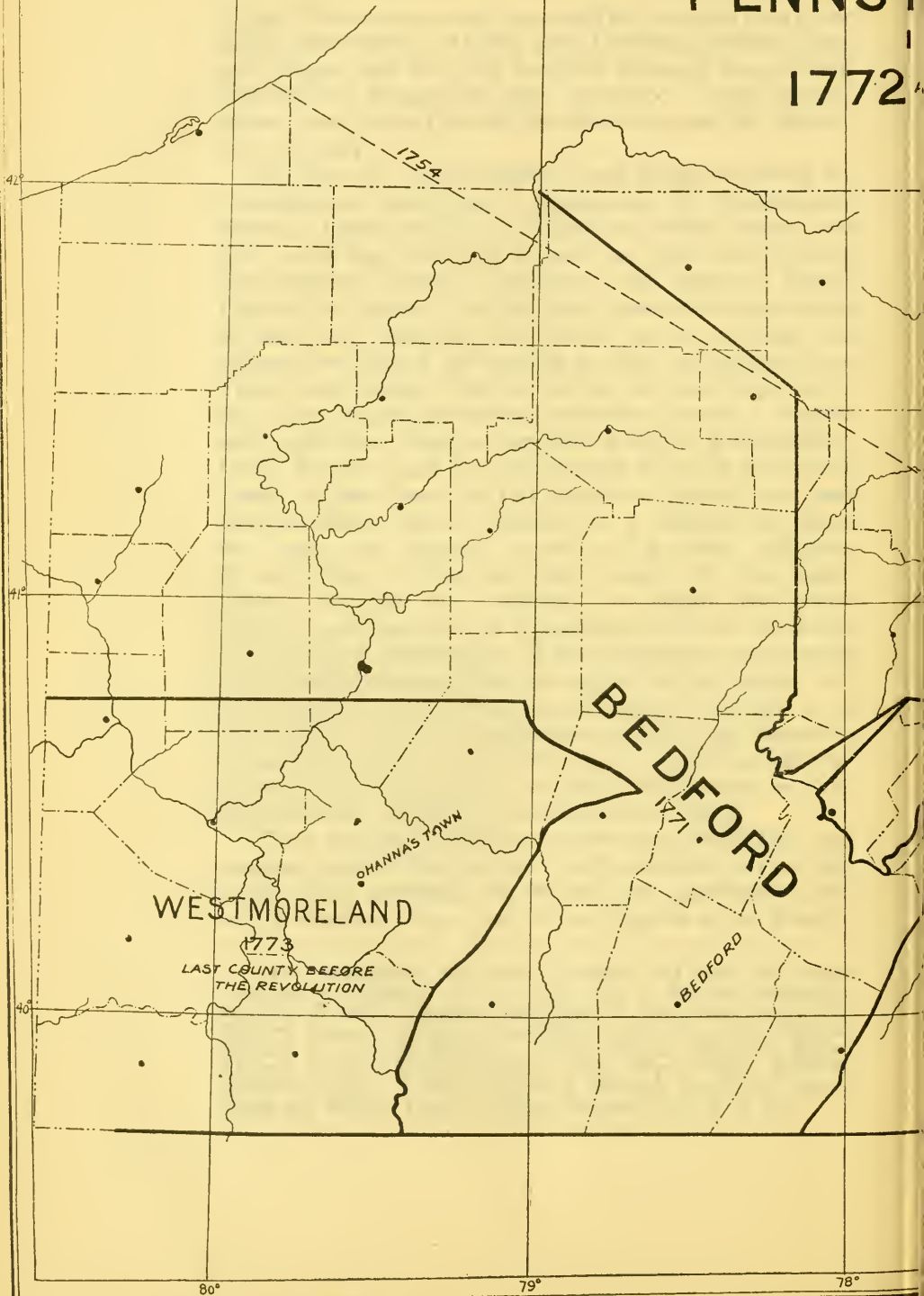
PENNS

1773



PENNSY

1772



VANIA

773.





was concerned. This, too, was the only way to learn land law. "There was not much wealth, except in land, and not many lawsuits, except those relating to the title to land," writes the late Justice Charles Huston, speaking of a large part of Central Pennsylvania, in which he learned land law, and that, too, a score of years later than this.<sup>1</sup> "In the District were titles within the purchase of 1754; and the Land Office titles were either Warrants or Locations, of 1766 and the following years; titles within the purchase of 1768, and these were either Warrants or Applications of 3rd April, 1769, and the following months, until September; \* \* \* No law book had been published of decisions in this State, except the first volume of Dallas's Reports. When I learned of the titles above mentioned, I did not know in what respects the one differed from the other. I was determined to become a lawyer, and to learn to understand all this; but how or where I could obtain the information was the difficulty. In Lycoming county, where I settled, were only three young lawyers, admitted in the same year, in the eastern counties, no one of whom knew any more of land titles than I did; and none of whom ever learned to know any more. I became acquainted with some men who had been Deputy-Surveyors. \* \* \* I particularly mention William Maclay, afterwards of Harrisburg, but then of Northumberland, at least in the summer season; from him I learned more than from any I had known before; perhaps than from all I had known before."

Justice Huston then indicates how most cases of ejectment tried in the Common Pleas would be taken to the *nisi prius* courts held in each county by Justices of the Supreme Court, and later the Circuit Courts held in the same way, but having the records kept locally. "In these courts only," he continues, "could I obtain the information I wanted; and regularly, for years, I met the Circuit Court, at each county in the District; went in with the court and came out when it rose; with papers before me, and pen in hand, writing down the titles on each side, the testimony of every witness, the points made as to the admission of evi-

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<sup>1</sup> "History and Nature of Original Titles to Land in the Province and State of Pennsylvania," by Charles Huston, late a Justice of the Supreme Court of the State, 1849. This is the man who was the teacher of Chief Justice Roger B. Taney.



dence, the decision on these points, and the opinions of the judge in his charge to the jury. In this I soon acquired an aptness and accuracy which are only attained by practice." If this method was necessary twenty or more years after Thomas Smith became Prothonotary at Bedford, it is plain that his varied duties at this time were precisely calculated to soon make him an authority in the land law of the Province.

Tradition at Bedford has it that Mr. Smith studied law especially during the period he was Prothonotary in the court house there, and there is every reason to believe he did, but not that this was the beginning of his study. The tradition is, no doubt, based upon the first known record of his admission, namely, that of readmission of 1778, such as occurred everywhere after the Revolution.<sup>1</sup> That his study was carried on in the old log court house and jail, which tradition says was the earliest public building and located on the northeast corner of the public square, is, of course, true, and also in the stone structure erected about the time he recorded his bond as Deputy Register of Wills, on the *northwest* corner of the same square.<sup>2</sup> He was now in his twenty-ninth year.

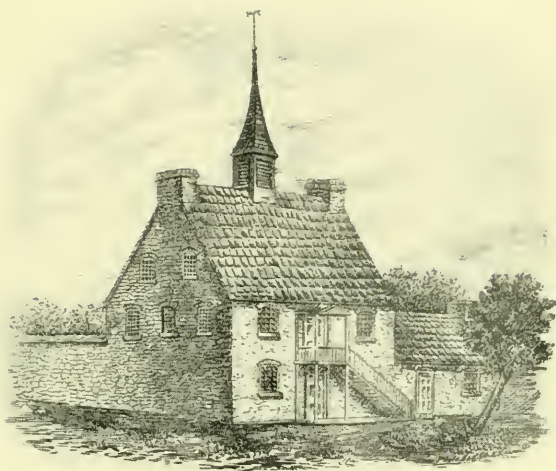
Just how far his practice extended, up to this time, is not known. Records of admission before the Revolution in most of the counties were very irregular. The nearest neighboring county seats were Carlisle, York and Hanna's Town. It is known that he practiced at the last-mentioned place about this time, but there is no record of his admission in the Westmoreland courts. The same is true of Carlisle, but at York, where it is known that he frequently

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<sup>1</sup> Hon. William P. Schell, who has written so interestingly of Bedford's history, states, however, that Thomas Smith practiced before his admission.

<sup>2</sup> This structure, of which the only known view is here presented, was built in 1774, according to the best authority, and was directly north of the present court house. The outside stairway faced the east and the other visible side the south. The upper part was devoted to court purposes and the lower part and walled yard to the uses of a prison. This is a reproduction of a view drawn by an old lawyer, John Mower, Esq., when it was about to be dismantled. Hon. William P. Schell thinks it accurate, except that the stairs came down to the left instead of the right. This view was first published in the *Bedford Gazette*.





BEDFORD COURT HOUSE OF 1774



had business at an early date,<sup>1</sup> he was admitted to practice on January 25 of this year, 1774.<sup>2</sup> This is the earliest recorded admission, so far as is known.

As to the *nisi prius* courts, in which he had so large a practice at a later date, the records, which, as has been intimated, were in the hands of the Supreme Court, have been long since so scattered that most records even of his busiest years are lost, while of this early time no evidence at all remains up to this period, the year 1774.

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<sup>1</sup> At the Pennsylvania Historical Society—in the Miscellaneous Manuscripts of York and Cumberland counties of 1738-1800, p. 197—is a letter from Dr. William Smith to Robert Magaw, of Carlisle, in which he desires a certain payment made "to my Brother" at York. It is dated July 6, 1772.

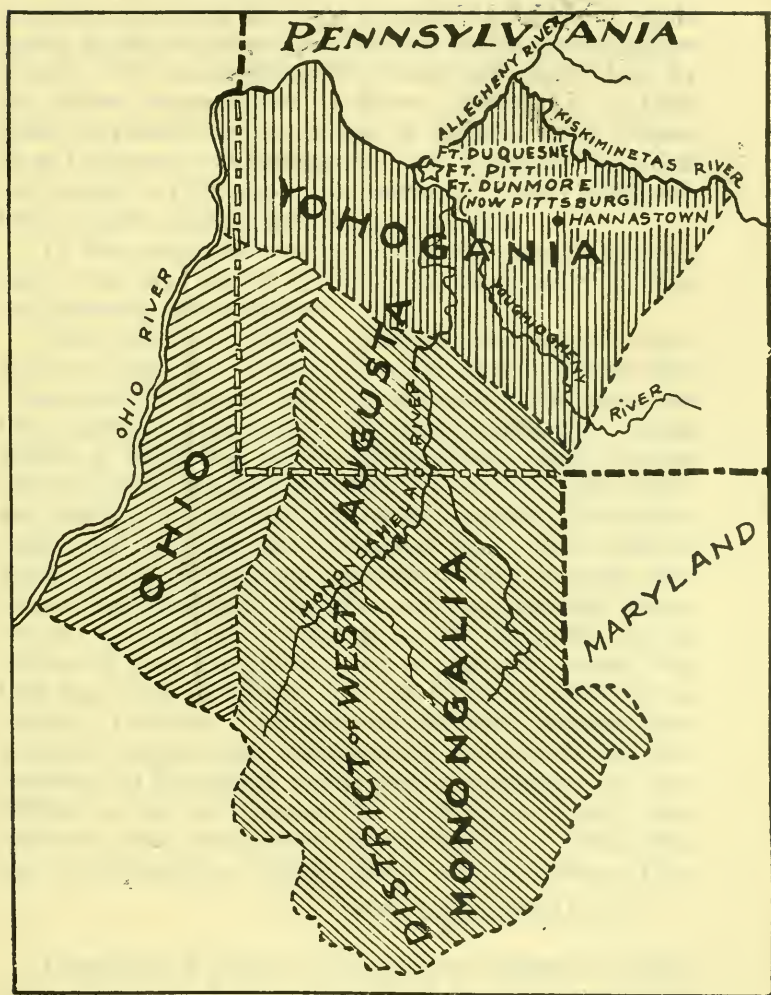
<sup>2</sup> Data taken from the records by Judge John W. Bittenger, York, Pa.

## V

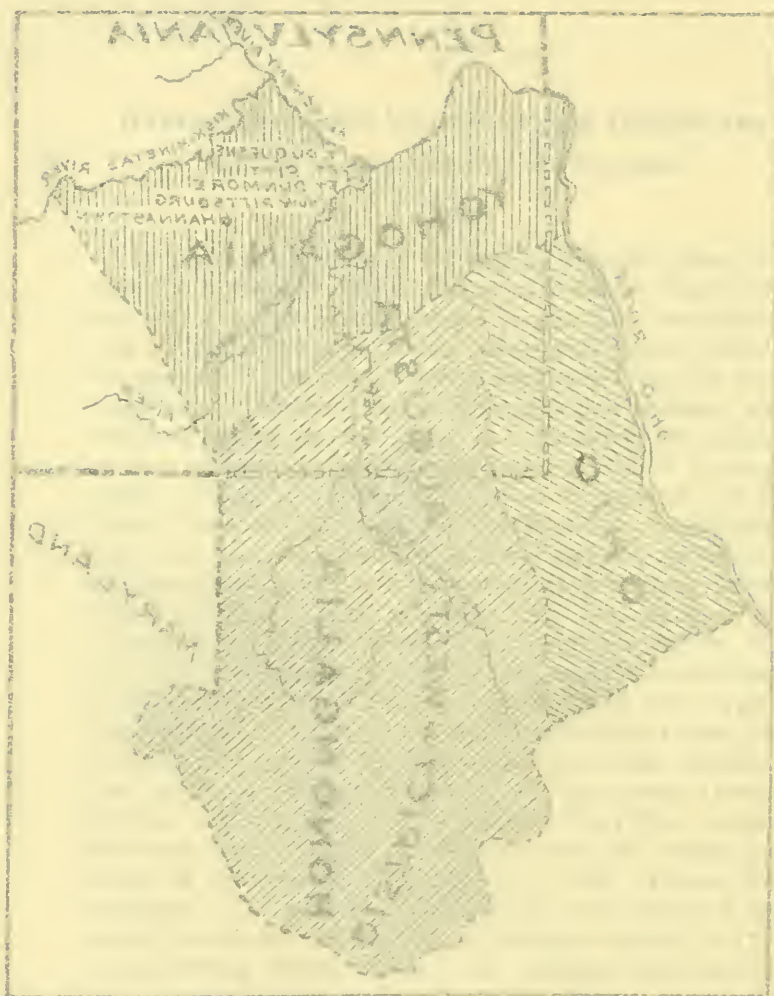
### WARFARE WITH THE VIRGINIANS, THE INDIANS AND BRITISH IN THE OPENING REVOLUTION

1774

If Thomas Smith was leading an intensely busy life with his numerous official and private affairs heretofore, the year 1774 was not calculated to give him much relief. The Province of Pennsylvania, along with others, was developing so fast and in so many ways that unsettled questions began to clamor for settlement. One of these, with which he had much to do, grew out of delay in the location of the western boundary, and acquiescence of Pennsylvania in Virginia's erection of a fort at the forks of the Ohio. So early as 1749 Governor Hamilton, at Philadelphia, had proposed the advisability of locating the lines in the southwest, when he heard of Virginia making private grants of land in that region. This met no favorable response, and was followed, five years later, by the Virginia fort and grants of land by that colony to encourage settlement around it. Pennsylvania objected, but Virginia claimed it was in her own territory, according to her surveyors. The French then took possession and completed the project as Fort Du Quesne. Then came General Forbes' expedition, late in 1758, and "Fort Pitt," whereupon the matter remained quiescent until the Indian purchase of 1768, when settlers began to rush in from both colonies. The partisan spirit which now appeared had much to do with the erection of Bedford county in 1771, a proceeding which aroused the Virginia Executive to take vigorous measures to protect his claim. It was this conflict which, more than anything else, led to the erection of Westmoreland county in 1773, and it was followed by the assumption by Virginia that all territory west of the Laurel Hill and south of the Kiskiminetas, Allegheny and



MAP OF VIRGINIA CLAIMS IN PENNSYLVANIA  
 showing Counties organized by the former.  
 After maps in the Pennsylvania Archives



THE STATE OF OHIO  
 DEPARTMENT OF COMMERCE  
 BUREAU OF STATISTICS  
 COLUMBUS, OHIO, 1900

Published by the State of Ohio, Department of Commerce, Bureau of Statistics, Columbus, Ohio, 1900.



Ohio rivers was in her West Augusta county. Later this West Augusta district was subdivided into the three counties of Monongalia, Ohio and Yohogania, the last-mentioned covering all above a northwest line which would nearly divide our present Fayette and Washington counties in half. The act creating Westmoreland county had, by the shrewd management of Robert Hanna, as St. Clair believed, placed the county seat at Hanna's home instead of at Pittsburg, and deliberately kept it there.<sup>1</sup> Had that act placed it at Pittsburg, the untoward events which followed might possibly have been prevented.

To the amazement of the people, or some of them at least, there was posted at Pittsburg, on January 1, 1774, the following advertisement:

"Whereas, his Excellency John Earl of Dunmore, Governor-in-Chief and Captain General of the Colony and Dominion of Virginia, and Vice Admiral of the same, has been pleased to appoint me Captain, Commandant of the Militia of Pittsburgh and its Dependencies, with Instructions to assure His Majesty's Subjects settled on the Western Waters, that having the greatest Regard to their Prosperity and Interest, and convinced from their repeated Memorials of the grievances of which they complain, that he purposes moving to the House of Burgesses the Necessity of erecting a new County, to include Pittsburgh, for the redress of your Complaints, and to take every other Step that may tend to afford you that Justice for which you Sollicit. In order to facilitate this desirable circumstance, I hereby require and command all Persons in the Dependency of Pittsburgh to assemble themselves there as a Militia on the 25<sup>th</sup> Instant, at which Time I shall communicate other matters for the promotion of Public Utility. Given under my Hand, this 1<sup>st</sup> day of January, 1774.

"JOHN CONOLLY."<sup>2</sup>

Lieutenant St. Clair, at his home at Ligonier, received this on January 12, and at once took means to notify Secretary of the Province Joseph Shippen, Jr., and also to arrest Dr. Conolly before the proposed meeting. This

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<sup>1</sup> Pennsylvania Archives, Vol. IV, p. 471.

<sup>2</sup> Colonial Records, Vol. X, p. 141.

was done on January 24, and Conolly confined at Pittsburg in the Sheriff's hands. He was, however, released by that officer on his honor and promise to appear before the court of Westmoreland. He, however, went to Virginia and returned by way of Red Stone, where he gathered a force of about twenty armed men, on the 28th of March. Officers at Pittsburg read to him the riot act, but he managed to get control of the fort. On April 4 George Croghan announced his sympathy with the Virginians. St. Clair had long believed he was a chief conspirator in it all. Croghan, it will be remembered, was a Deputy Superintendent of Indian Affairs, and held thousands of acres under Pennsylvania applications at this time.

Conolly kept his word to appear at the Westmoreland court, but in a most picturesque manner, well described by Thomas Smith, one of the bar, in a letter written in court at that time to Secretary Shippen:

"Sir, The present transactions at this place are so very extraordinary that I am perswaded you will be very much surprised at the relation of them, if anything that is absurd and unwarrantable which originates from Ld. Dunmore can surprise you. I think I am warranted in this observation by his Lordship's Letter to His Honor, a Duplicate of which, together with a letter at the same time to Conolly we have just had read to us.

"After Connolly was committed to Gaol in the manner you have been informed, the Sheriff let him at large on his giving him his word of *Honour* to return at the Court; he did return indeed and in such a manner as might have been expected from his preceeding conduct; we heard when we came up to this court that he was mustering a large party in order to prevent the Court from sitting; we thought that there could not be any foundation for such a report; but at the same time we thought it prudent to order the Sheriff to raise as many men as he could collect, to prevent us from being insulted by a lawless set of men, acting under the colour of authority—the time was so short that but few were collected on our side and those few were ill armed, so that we found ourselves in a very disagreeable situation, when we received certain intelligence that Connolly was coming down with 200 armed

men; when we found they were at hand the Magistrates thought it prudent to adjourn the Court as it was near the time; they soon after came down to the number of 150 or 180, with colours flying, and their Captains, &c., had their swords drawn, the first thing that they did was to place centinels at the Court House Door, and then Connolly sent a Message that he would wait on the magistrate and communicate the reasons of his appearance, the Bench and Bar were then assembled in Mr. Hanna's House where we sent him word we would hear him; he & *Penticost* soon came down, and he read the Paper which will be sent down to his Honour the Governor, with the bearer of this; and then he read a Duplicate of Ld. Dunmore to our Governor, together with the letter mentioned before.

"The Court<sup>1</sup> told him they would soon return an answer to what he had said (they did not think it prudent to do it without consulting together & taking the opinion of the Bar) We soon agreed on the terms of the answer, & the Gentleman who had the principal hand in forming it has done it in such a manner as I am persuaded will procure him the thanks of Government; it contains firmness and moderation, and as far as I am capable of judging, it was not possible to form one more free from exceptions in our present situation, one in any other form might have been the occasion of altercations; which might have produced under concessions or been attended with the most fatal consequences; for I have reason to believe that the greatest part of them were wishing for some colourable reason to quarrel; the Bench purposed to deliver their answer in the Court House; however, in that particular they counted without their host, for they were refused admittance, & Connolly waited for them at the Court House Door; where Mr. Wilson at the request of the Court delivered it, & after exchanging Copies they departed

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<sup>1</sup> The court was composed of Justices Arthur St. Clair, Alexander McKee, William Lochry, James Pollock, James Cavet, Eneas Mackay, Van Swearingen and William Bracken. Pennsylvania Archives, 1760-1776, p. 480. These were the only ones present. The court as commissioned in the creating act on February 27, 1773, included also William Crawford, President; Thomas Gist, Robert Hanna, George Wilson, William Thompson, Joseph Spear, Alexander M'CLean, Samuel Sloan and Michael Rugh. Colonial Records, Vol. X, p. 78.

more peaceably than might have been expected; however, the consequences of such proceedings are too apparent to need being enumerated; the administration of Justice must be entirely at a stand, & indeed I can not help thinking that this mob has collected for that purpose, as I am well assured that amongst all of those who assembled there was not one single man of any Property; on the contrary, the greatest part of them were such as are obliged to hide themselves from their creditors or such as are under the necessity of taking shelter in this part of the country to escape the punishment due to their crimes—it seems Ld. Dunmore gave Connolly Blank commissions trusting to his own prudence to fill them up; by inserting the names of proper persons, Connolly in order to be consistent with himself bestowed one of those Commissions on one Teagarden an old fellow who has several times been *committed* for Felony. I don't inded know that he has been *convicted*; because he has always broken the Goal, once I think he was committed to Lancaster Gaol & escaped; his character is so well known that those who are the strongest advocates for the present disturbances are ashamed of his being appointed one of their Captains.

“The People in this part of the Country, who would wish to enjoy the benefits of Society & would submit to any form of Government, are in the most disagreeable situation that can be imagined; their *Property*, their *Liberty*, and their *Lives* are at the mercy of a lawless desperate banditti! in such a situation they look for, and have the utmost reason to expect the protection of that Government under which they have settled; what is the most proper method to be taken it would be presumption in me to suggest; there are but two ways, the one, to agree on a temporary line of jurisdiction until the matter can be finally settled, the other to establish a sufficient Garrison at Fort Pitt to withstand the Rabble who act under Lord Dunmore's commission; it would have been a happy thing for this part of the country if this last measure had met with success when it was first recommended to the Legislature, and indeed sensible people in this part of the country who are well affected to this Government, cannot help drawing conclusions from the opposition which that measure met

with, which I am persuaded could never be the motives of those who may have made the opposition to it.

"The conduct of Ld. Dunmore is really the most extraordinary, in the light in which the people in this part of the country are obliged to view and feel it, that can be imagined; to establish the jurisdiction of a different Province over the People who have purchased and settled and lived for a considerable space of time peaceably under this, to establish this jurisdiction by a military force, is such an absurd measure, that I believe it will be difficult to suppose any man in his senses would have adopted it.

"I hope you will excuse this incoherent scrawl when I inform you that it is wrote in a small room amidst the clamour and confusion of a number of People; if you think the contents of it are of consequence enough to be communicated to his Honour the Governor, I will request you to do it, if not you will please excuse this impertinence of  
Sir

"Your much obliged

"and most humble servant

"THOMAS SMITH"

"Westmoreland Court, April 7, 1774."<sup>1</sup>

Governor Penn had, on January 31, as soon as news of the affair was first received, sent a message to Lord Dunmore concerning it, saying, among other things, that the Mason and Dixon Line had been measured, of course, and from that line to a known point in the south line of the city of Philadelphia another measure had been taken by actual survey, as also from this latter point to that part of the River Delaware in the same latitude as Fort Pitt; and that from this data most exact calculations had been "made by Dr. Smith, Provost of our College; Mr. Rittenhouse and our Surveyor-General, in order to ascertain the difference of longitude between Delaware and Pittsburg,

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<sup>1</sup> Pennsylvania Archives, 1760-1776, p. 620. The date is here given as 1775, but it is so evidently current with the event which occurred on April 6, the day before the letter was written, and is so used by Major Robert H. Foster, in his sketch of this controversy in the Third Series, Vol. III, p. 490, when he had access to the originals, that there can be no doubt that this is one of the not rare typographical errors in those volumes.



who all agree that the latter is near six miles eastward of the Western extent of the Province," and he enclosed the drawings to illustrate it. Lord Dunmore's reply was not received until March 16, and in that he demanded St. Clair's dismissal, making it known that he would hold the territory until the matter was settled by the Crown.<sup>1</sup>

It may be noted that, at this very time, letters were passing between the Governors of Connecticut and Pennsylvania, also, in controversy over the former's claim to practically the north half of the latter's territory, but as Mr. Smith had little connection with it, although his brother, Dr. William Smith, had, it is sufficient merely to recall the fact.

Two days after Mr. Smith's letter of April 7 the Governor reappointed him and St. Clair, along with others, as Justices of the Common Pleas Court at Bedford. St. Clair was no doubt made a member of both courts, in order to harmonize their action. A Justice of the Peace was a far more important officer in those days than at present, as in them was lodged almost the entire government of a county, including its Bench of Justice. Consequently, St. Clair and Smith were each not only Prothonotary, Clerk of Courts, Register of Orphans' Court, Recorder of Deeds and Justice of the Peace in the modern sense, but also Judge of Common Pleas and County Commissioner.<sup>2</sup>

Four days after this reappointment, when Mr. Smith had returned to Bedford, a messenger, Ephraim Hunter, who had acted as Deputy Sheriff of Westmoreland, passed through on his way to Philadelphia with further news, which Mr. Smith supplemented in the following letter to Secretary Shippen:

"Sir, If you have received my Letter, which I did myself the favor to write by Col. Wilson,<sup>3</sup> you will not be surprised to be informed of the continuation of the outrages committed by the Virginians; they have now arrested three of the Magistrates of Westmoreland county, who are now on their way to Augusta Goal, exposed to the insults of the rabble

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<sup>1</sup> Apparently the Penns, at this time, were inclined to hold the theory that the western boundary should duplicate the winding course of the Delaware.

<sup>2</sup> Mr. Smith's salary as Prothonotary, etc., was £50. Pennsylvania Archives, 1760-1776, p. 602.

<sup>3</sup> George Wilson. Colonial Records, Vol. X, p. 165.



who are sent as their Guard—the Crime alledged against them is, I am informed, the answer which the Court gave to Connolly's modest address & proposals. I hope for the honour of this Province, that it will not sit calmly looking on and see its Magistrates, *as its Magistrates*, taken by a set of lawless men, when they were within its known limits—hurried away like Criminals to the Gaol of another Province, there to be confined contrary to all Law and Justice, to satisfy the whim & caprice of a Man who seems either to have totally divested himself of any regard to natural Justice, I was going to say to the Law of nations, if I might be allowed the expression, or else he is made the Tool of a set of desperate men who have more cunning than himself, for I have many reasons to think that this Scheme was hatched at Fort Pitt; the reasons that could induce any man of common sense to take such a Step I am at a loss to guess.

“The Bearer of this was sent down to go to Philadelphia with the account of these proceedings; I thought it my Duty to enable him to pursue his journey, by accommodating him with Money—he has acted sometimes as under Sheriff, & if the high Sheriff had conducted himself in the same spirited unsuspected manner that this man has done, I am perswaded these disturbances might have been prevented, but he, in the first place, had so little regard to his Duty, that he Let Connolly at liberty on his promise to return at the Court, and when he was ordered to raise the Posse his conduct was a little mysterious, & he was extremely backward & remiss; the bearer can give you farther information in this particular.

“I am, Sir,

“Your Very Humble Servant

“THOMAS SMITH”

“Bedford, April 13th, 1774.”

Mr. Smith's commission as Justice having arrived, he took the oath of office on May 3. It was four days later that the Governor sent commissioners to Lord Dunmore, composed of James Tilghman and Andrew Allen, with power to bring the Pittsburg matter to a conclusion. During this brief interval news of trouble between the Vir-

ginians and Shawnees began to be rumored, and by May 20 Chief Cornstalk sent a speech to Justice Alexander McKee, George Croghan, Esq., and Captain John Conolly, at Pittsburg, to find out what reparation was going to be made for various injuries, especially murders of certain Indians. The whole frontier became thoroughly alarmed. St. Clair secured a voluntary force of rangers with a line of stockades. Conolly's action was such as to make St. Clair believe that an Indian war, or threats of one, was a part of the design to hold the Fort Pitt territory. When, on June 22, Captain Conolly showed St. Clair a letter from Lord Dunmore, saying that the Pennsylvanians asked too much, and that the captain might arrange a temporary boundary ten or twelve miles east of Pittsburg, it looked as though his surmises were correct. The inhabitants were terror-stricken and fled the country in large numbers. Those who remained petitioned the Government of Pennsylvania for aid, and measures were at once set on foot. This was late in June, and a meeting was held with the Indians at Pittsburg on the 29th, but it became evident that there was something more back of Conolly's aggravating course toward the Indians.

Meanwhile, serious as was the aspect of affairs with the Indians and Virginians, there was, in these months of May and June, a still more serious matter arising to claim their attention to the eastward. The storm center was in Boston, where, so early as the previous February, their Governor had warned them that the King had expressed his disapprobation of their committees of correspondence. The strained relations in that colony were not lessened, as all students of our national history know, and it soon led to all those events connected with the closing of the port of Boston, as a rebellious city. On May 18 "A Philadelphian," writing in the *Pennsylvania Gazette*, said: "Liberty, Property and Life are now but *Names* in America. \* \* \* We dare not call even our Lives our own. \* \* \* New York, Philadelphia and Charles Town cannot expect to escape the fate of Boston. \* \* \* Our Brethren in Boston may perhaps stand in Need of our Counsels." On the following day, May 19, 1774, Paul Revere arrived in Philadelphia with a letter asking for this very counsel.

A meeting was at once called for the next day at the

City Tavern, which was attended by some two or three hundred citizens. They appointed a Committee of Correspondence of nineteen members, among whom were John Dickinson, Joseph Reed, Charles Thomson, Dr. William Smith, Thomas Mifflin, Thomas Wharton, Jr., and George Clymer, who were to take proper action and extend sympathy. A more vigorous meeting was held on June 28, and a circular letter to the counties was prepared by Dr. William Smith and John Dickinson, as a means of seeking the sentiment of the people as to appointing deputies for a proposed Congress and asking the speaker of the Assembly to secure a meeting of that body as soon as possible. They were asked to appoint Committees of Correspondence to meet at Philadelphia on July 15. On July 4 this local committee appointed a sub-committee to make a preliminary draft of instructions, which were used as a model in the convention which met on the 15th at Carpenters' Hall.<sup>1</sup> This Provincial Convention, in which George Woods represented Bedford county, on the 16th appointed John Dickinson, Dr. William Smith, Joseph Reed, William Atlee, James Smith, James Wilson, Daniel Broadhead and others a committee to draft instructions, and on the 21st these were laid before the Assembly then in session at the State House.<sup>2</sup>

Incidentally it may be noted that the day before the Assembly had voted a loan of £800 to build court houses in Bedford, Westmoreland and Northumberland counties.

The Assembly on the 22d of July responded by promptly appointing Speaker Joseph Galloway and six others as delegates to the proposed Congress, Morton and Mifflin being among the number, and instructed them that, while urging their claims, not to do anything "indecent or disrespectful to the Mother State."

With the summer of 1774 came increased hostilities between the Virginia settlers and the Shawnees about Fort

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<sup>1</sup> Three days later James Wilson, at Carlisle, wrote St. Clair, at Ligonier: "In the interior parts of the Province the public attention is much engrossed about the late conduct of the Parliament with regard to America, and the steps which the colonies ought jointly to take to maintain their liberties; against which, to say the least of the matter, a very dangerous blow seems to be aimed. A general Congress from all the different provinces will certainly be appointed."—"The St. Clair Papers," by William Henry Smith, Vol. I, p. 324, 1882.

<sup>2</sup> Journals of Assembly, Vol. I, p. 1.

Pitt, or Fort Dunmore, as it was now called. The careful course of St. Clair, and the policy of the Pennsylvania government in making it clear to the Indians that the Virginians were the cause of the trouble, and that while the Pennsylvanians kept careful watch over their lines of rangers and stockades, they would seek to avoid becoming involved by the actions of Conolly and Lord Dunmore, all contributed to confine the war almost entirely to the west side of the Monongahela. Lord Dunmore himself came up to Fort Dunmore and issued proclamations, which were met by counter-proclamations by Governor Penn. Efforts were made to involve Pennsylvania in a conflict of arms, but without success. Finally, war with the Indians came to a close in October, but before Lord Dunmore left for Virginia he caused the arrest of Thomas Smith at Redstone, east of the Monongahela, for acting as a Pennsylvania magistrate. He was released on bond to appear before the court, which was to be opened December 20 following, but, in fact, did not open until February 21, 1775.<sup>1</sup> It is not known what was the result of this trial or whether it occurred. It is not material, however, for while Virginia government was to continue some years yet, the impending crisis between all the colonies and Great Britain was rapidly diverting the attention of all from the temporary truce which seemed to be established at the forks of the Ohio.

With autumn came the Continental Congress and the meeting of the Assembly. Bernard Dougherty represented Bedford county in the latter. John Dickinson was added to the list of delegates to the Congress on October 15. On December 8 the Assembly received the report of her delegates and recommended it to the people two days later. On the 23d the Assembly refused Governor Penn's request for repair of the barracks.

While the Assembly were in session another Provincial Convention of Pennsylvania also met in Philadelphia soon after the holidays, namely, on January 23, 1775, in which Bedford was not represented. This convention showed that while the colonists wished for restored harmony, they also realized that a terrible struggle was before them, and made recommendation to prepare for non-intercourse in

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<sup>1</sup> Pennsylvania Archives, Third Series, Vol. III, p. 495.

trade and dependence on home supplies. This convention adjourned on the 28th, and the situation brought forth a message, on February 21, from Governor Penn to the Assembly, which was still sitting at the State House, pleading for a wise course in this "alarming crisis." On March 9 they replied, thanking him, while they at the same time added: "We have, with deep concern, beheld a System of Colony Administration pursued since the year 1763, destructive to the Rights and Liberties of his Majesty's most faithful subjects in America," and now hoped that the petition of all the colonies then before the throne might succeed. On May 1, when a letter came from Franklin, in London, stating that troops were to be sent, Governor Penn sent a message, with an overture of peace from Parliament, assuring the Assembly that this was the first colony to receive the overture.<sup>1</sup> Two days later they replied that it was not satisfactory, and even if it were, it was now a matter for the united colonies to decide.

Franklin returned on May 6, and he, Thomas Willing and James Wilson were added to the delegates in Congress at the State House. Three days later the people of Bedford county chose their Committee of Correspondence, namely, George Woods, Samuel Davidson, Thomas Smith, David Espy and George Funk. On June 30 the Assembly approved the voluntary military organization of the people as Associators and appointed a Provincial Committee of Safety to call them out in any emergency and prepare for a possible conflict. Franklin was made its President in September. Congress was in session almost continuously in 1775, and on October 18 it called on the Assembly for one battalion. November 25 the Assembly made rules for the government of the Associators, by which officers were to rank according to the age of the counties. On February 22, 1776, came a message from Governor Penn on the Connecticut claims in the north part of the Province. This must have had a strange sound in a place controlled by an Assembly and Congress, both of whom were on fire with preparations for a war with his sovereign. Four days later Franklin asked, on account of age, that he might confine himself to Congressional duties.

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<sup>1</sup> Colonial Records, Vol. X, p. 252.



While these events were happening at Philadelphia the Bedford Committee of Correspondence, of which George Woods was Chairman, and Thomas Smith the most influential member, was struggling to coöperate, even though they were still suffering from the effects of the war with the Virginians and Indians and other frontier troubles of the past two years. As evidence of the work there was for Mr. Smith in these frontier affairs is his reply to his friend St. Clair's request for papers and maps on the boundary question the previous autumn:<sup>1</sup>

"I am just favored with yours," writes Mr. Smith, "and I am sorry it is not in my power to comply with your request; but I have neither of the papers or calculations you mention. I have just asked my brother (who is here), and he has none of them with him. How far it might be expedient in one point of view for the Congress, YET to settle even temporary boundaries, might, perhaps, deserve some *consideration*. If such a thing could be done with propriety, it would be of the greatest utility to the peaceable inhabitants in your county, and I have always thought, since the dispute began, that it was set on foot by a designing tool, with a more insidious view than was at first generally imagined, viz., in order to set the Colonies at variance with one another. Could it be viewed in that light, it would at present have a greater tendency to a speedy settlement amongst the *people themselves* of a temporary boundary, without the interposition of the Congress, than any other argument that could be used. If they shall judge it proper to intermeddle in the matter at all, and if the Virginia delegate has a real intention of settling it in any reason, the Monongahela will be greatly in favor of the Virginia[ns], even by Mr. Hooper's map, which I have before me, but which I can not venture to send up without his permission, and since he made that map, which is done by actual survey of the Monongahela, he has got the camps of Delawares, by which it appears that Fort Pitt lies three or four miles farther east than

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<sup>1</sup> The letter is dated Bedford, September 5, 1775, and appears in "The St. Clair Papers," by William Henry Smith, Vol. I, p. 360, 1882. Dr. Smith also writes St. Clair, just the day before, saying: "Copies of the calculations by Mr. Rittenhouse and myself, signed with our names, were sent to Virginia. I wish I had known they would have been of any use on the present occasion."





John Penn  
Half-tone of etching by  
Albert Rosenthal  
from a painting in possession  
of the family in England



JOHN PENN  
Last Colonial Governor of Pennsylvania.



he has placed it. By comparing his map and your and Rittenhouse's lines, Fort Pitt is at least four and at most not much above six miles within this Province, as nearly as I can recollect the distance you made it. Mr. Hooper may be considered as an undoubted authority on the side of Virginia. I believe he is a gentleman of candor and veracity, and you know he was a warm and violent *Croghanite* at the time when he made it. I am going to the woods tomorrow morning. I need not tell you that I write now in haste. P. S.—There is not one barrel of flour in or about town, and Mr. O'Hara requests you would endeavor to supply yourselves, which he thinks you can now, after the rain, easily do."

But this was in September, 1775, and early in the spring of '76 the Bedford Committee of Correspondence found great difficulty in carrying out the recommendations from Philadelphia. They decided to appeal to the Assembly for aid, and the petition, which is evidently the work of Mr. Smith, reached the Assembly on March 7. It is an excellent sample of his ability to plead a cause in the wise, cautious, conciliatory and conscientious manner that characterized his work during his entire life.

"We think it our Duty," the petition proceeds, "as members of the Committee of Correspondence of the County of Bedford, humbly to represent to the Honourable House the peculiar situation of that county; by Reason of which we flatter ourselves, that the unusual Request, which we, in behalf of the Associators within the same, are now going to make, will not appear altogether unreasonable.

"Our Country is new, and on the Frontiers,—its Inhabitants few, and scattered amongst the Mountains; by Reason of which they are under much greater Inconveniences and difficulties in associating and mustering than those of the more interior Parts of the Country, having frequently twenty or thirty Miles to ride for that Purpose: This must necessarily take up much of their Time, which, on account of their being mostly new Settlers, is a peculiar Loss and Hardship on them, as it is almost their only Treasure: Yet, notwithstanding these Circumstances, we can, with great Truth and Pleasure, assure the Honourable House that they are not only as unanimous in their patriotic Principles, but

as constant in their Exercise, as any in the Province who have none of their Disadvantages to encounter;—besides, several of the officers and companies have been at a pecuniary Expense in paying Fugal-Men, Drummers, Fifers, and for Drums &c. which they could ill afford; and others of them, for this Reason, have not yet been able to procure these articles, nor to be taught the Exercise as completely as they could wish.—By Reason of our remote and Scattered Situation, it is impossible for us to receive the necessary Information in Time to enable us to regulate ourselves, according to the Modes recommended to the Counties, to transact their Business in; to this cause it is owing, that we could not comply with the Advertisement, published some time ago respecting these articles.—It will perhaps be said, let them, such as have not already done it, buy and supply themselves with such articles, in the same Manner the other Counties have done, and then let them deliver in their Accounts of the Expenses incurred, and they will be paid in the same regular Manner;—however trifling such Expense may appear, yet we are well convinced, that it is out of the Power of many of them to *advance Money* sufficient for such Purpose:—By this confession, our County will perhaps appear too insignificant to merit any Attention or Encouragement:—To those altogether unacquainted with the Situation of a Frontier and new Settlement, this would appear to be the Case;—but when it is remembered, that, upon a late Demand, we, in a few Days, raised and sent off a Company of Rifle-Men;—that the greatest Number of our Inhabitants are inured to Hardship, and that many of them were in the Service, in the late War, particularly against the *Indians*; these circumstances will, we believe, entitle us to some Regard.—We therefore beg leave to submit to the Honourable House, whether it would not be expedient to empower the Committee appointed to settle the accounts of the Associators within the Province, to draw on their Treasurer, in Favor of your Petitioners, or of such other Persons, in the County, as may be thought most proper, such a Sum of Money as will answer, in some Measure, these necessary Purposes;—the Persons, to whom it is delivered, to be answerable for it;—the Accounts sent down properly authenticated, in a limited Time, and subject to the same Controul the other



Associators' Accounts have been; and if it appear that the Persons, who shall receive the money, have paid it where they ought not,—they are to be answerable in the first Instance: We should not think it necessary, that much more than Half the Sum paid to equal Number of Companies, in any other Part of the Province, should be advanced, as we think that will answer every *valuable* Purpose.—We hope our Request will appear the more equitable, when (added to the Reasons arising from our Situation) it is considered, that, at a future Day, we will have to pay our Proportional Part of the very large Sums paid to most of the other Associators in the Province,—and indeed our People will urge this point so strongly to us, that it will be impossible to keep up that Spirit of Unanimity, and that Readiness to lend their little Aid, in time of need, in conjunction with their more powerful Com-patriots, but they will become languid and indifferent, if they see that no Regard is paid to their Situation—when they *feel* that those Advantages are denied to them, which it is out of their Power to obtain by the same Method which those did, who were not under their local and other Disadvantages.—We had twenty companies returned to us, which are to be formed into two Battalions;—the Reason this was not sooner done was, that we delayed it till we should receive the Articles of Association for them to sign, which they are now doing.

“As we have no other View, in this Representation, than a faithful Discharge of the Trust reposed in us, we pray the Honourable House will not construe the only Means, we could think of, to answer the End, into an offence; we shall be ready, to the utmost of our Power, to do our Parts in carrying into Execution any other Method that may be proposed, if the Prayer of our Petition shall be thought improper; which the Honourable House will be pleased to take into their consideration, and their Petitioners, as in Duty bound, will Pray, &c.

“GEORGE WOODS, *Chairman*,  
“THOMAS SMITH.”

On the 11th of March—four days later—the Assembly granted this petition in the sum of £200, payable to their representative, Bernard Dougherty.<sup>1</sup>

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<sup>1</sup> Votes of Assembly, Vol. VI.

Meanwhile, on the very next day after the petition was received, namely, March 8, 1776, the Assembly received other petitions from Philadelphia and the back counties, asking for increased representation in that body; whereupon it was voted that Philadelphia should have four more; Lancaster, York, Cumberland and Berks each two more; and there should be one more each for Bedford, Northumberland and Westmoreland. John Dickinson and Joseph Reed prepared a bill to effect this. John Morton became Speaker on the 15th, and increased representation was voted on the 23d of March, and an election ordered.

During the next months a propaganda was in progress in various parts of the State to create a sentiment in favor of replacing the old Assembly by a Convention. It had been in progress with some hopes of success, it seems, for it brought a warning from Philadelphia to Lancaster.<sup>1</sup> "I am desired by some friends of mine," writes Edward Shippen to Mr. Yeates, "to write you a line by this opportunity, to appraise you that a certain bawling New England man called Doctor Young,<sup>2</sup> of noisy fame together with Joseph Barge is going up to Lancaster to endeavor to persuade the people there to join in the late attempt to dissolve our Assembly and put everything into the hands of a Convention, who it is thought would settle a form of Government not very favorable to Liberty. In what way your people may stand I know not, but surely they would not be willing to give up all our Charter privileges at one stroke; many of the people here who even wish for our Independence are averse to the measure now proposed, as tending to deprive us of some valuable Rights, without an Assurance of a Substitute; and the Assembly can as well carry the Resolve of Congress into Execution as a Convention."

April and May were to witness Thomas Smith's intro-

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<sup>1</sup> Letter from Edward Shippen, at Philadelphia, to Jasper Yeates, at Lancaster, dated May 23, 1776, in the Yeates Papers at the Pennsylvania Historical Society.

<sup>2</sup> This Dr. Thomas Young, an old acquaintance of Ethan Allen, suggested the organization and name of Vermont, it is said, and when the petitioners for that State were at Congress in Philadelphia, in 1777, they were much impressed by the new constitution of Pennsylvania, and this led to Vermont adopting one almost exactly like it. The Council of Censors, by Lewis Hamilton Meader, A.M., Papers from the Historical Seminary of Brown University, reprint from the Pennsylvania Magazine of History and Biography.

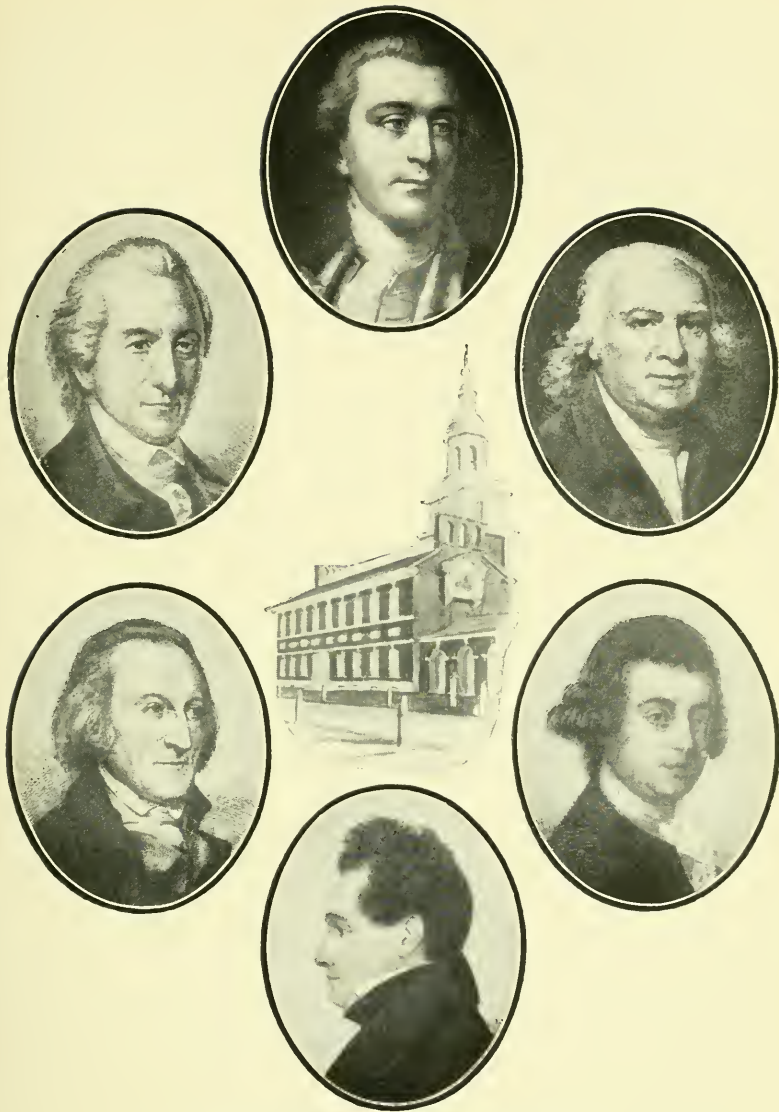
duction to larger affairs. The two battalions of Bedford Associators were now well organized, and John Piper was made Colonel of the first. On April 19 Speaker John Morton signed the commission of Thomas Smith as Colonel of the Second Battalion of Bedford County Associators. His commission, however, scarcely reached him before he was elected additional member of the Assembly for Bedford, and proceeded to Philadelphia, where, on May 20, returns of election were received by the Assembly, and Colonel Thomas Smith was admitted without the usual oath of allegiance heretofore required of members. It is well to note, at this point, that George Bryan of Philadelphia, two days later, asked to be port officer for that city, a request which was soon after granted, and serves to introduce into these public movements a man with whom both Pennsylvania and Colonel Thomas Smith were to have considerable to do.

On June 5 Colonel Smith was introduced to legislative work by being placed on the committee to draft instructions to the delegates in Congress, with John Dickinson, Robert Morris, Joseph Reed, Clymer, Wilcocks and Pearson. Nine days later, June 14, the committee's draft was adopted and signed by Speaker Morton, and the most notable feature of it was that previous restrictions about voting for independence were removed. This was practically a preliminary declaration of independence by the Assembly. At the same time, the Assembly received a petition from Philadelphia objecting to the present structure of that body, the chief objection being that it was partly under oath of allegiance to the King and partly not. These objections had been abroad for some time, and during June had so much influence as to make it difficult to secure a quorum. By the 14th they seemed to be in despair of securing a quorum any longer, and the situation soon had to be solved by radical measures. They adjourned on the 14th, without carrying out Congress' recommendation to raise troops for the flying camp. These objections grew out of the recommendation which Congress made on the very day that Colonel Smith became a member of the Assembly, namely, that each colony form a new government not under authority of the King. This was virtually asking each Province to make individual

declaration of independence before all did—a step which, events showed, many in the various colonies hesitated to take.

The Philadelphia committee, when the Assembly proved so helpless, therefore called, through its Chairman, Colonel Thomas McKean, a Provincial Conference of the various county committees, which met on June 18 at Carpenters' Hall, Philadelphia, and proceeded at once to arrange for an election of delegates to a Constitutional Convention to form a new government. So these representatives of Pennsylvania virtually declared the Province a free and independent commonwealth on June 19. They provided for the meeting of the Constitutional Convention on July 15, and themselves adjourned on June 25.

This June Provincial conference had no intention of either itself displacing the Assembly or calling a Constitutional Convention, which would in itself replace the existing government. It was only proposed that the convention should form a constitution, under which a new Legislature should be elected. This was true, notwithstanding the fact that, even with the election of additional representatives, the existing Assembly had a majority which was not inclined to be radical and overthrow its charters and precedents which had been built up through nearly a century of the most persistent fighting between the Assembly and proprietary. The old Assembly had made Pennsylvania liberty and government what they were through the long and persistent struggles led by men like Speakers David Lloyd and John Kinsey, and it was not strange that conservative men, even among those who supported armed resistance to Britain, should hesitate to overthrow the old Assembly and their charter. It must be remembered, too, that the spirit of independence was only a new growth, and, while it was taking root in new soil every hour, there was some soil it had not yet reached, and this was merely a matter of time. It became evident that there was a majority of the old Assembly which proposed to cling to the old charter and continue the Assembly, but Colonel Thomas Smith, while cautious and tactful, was not one of that majority. His was that rare insight of the pioneer which sees a true middle course in a developing crisis, and that equally rare wisdom which



THE PENNSYLVANIA ASSEMBLY'S COMMITTEE  
which first recommended Freedom for their Congressmen to vote  
for Independence, except Isaac Pearson





steers one's course so as to be constructive. This was recognized even at that time, and it soon became plain that he was to be chosen to form the new government, which should make Pennsylvania a new and independent commonwealth, as he was already chosen to cautiously, tactfully and wisely aid in bringing to a close her status as a Province of the King.

## VI

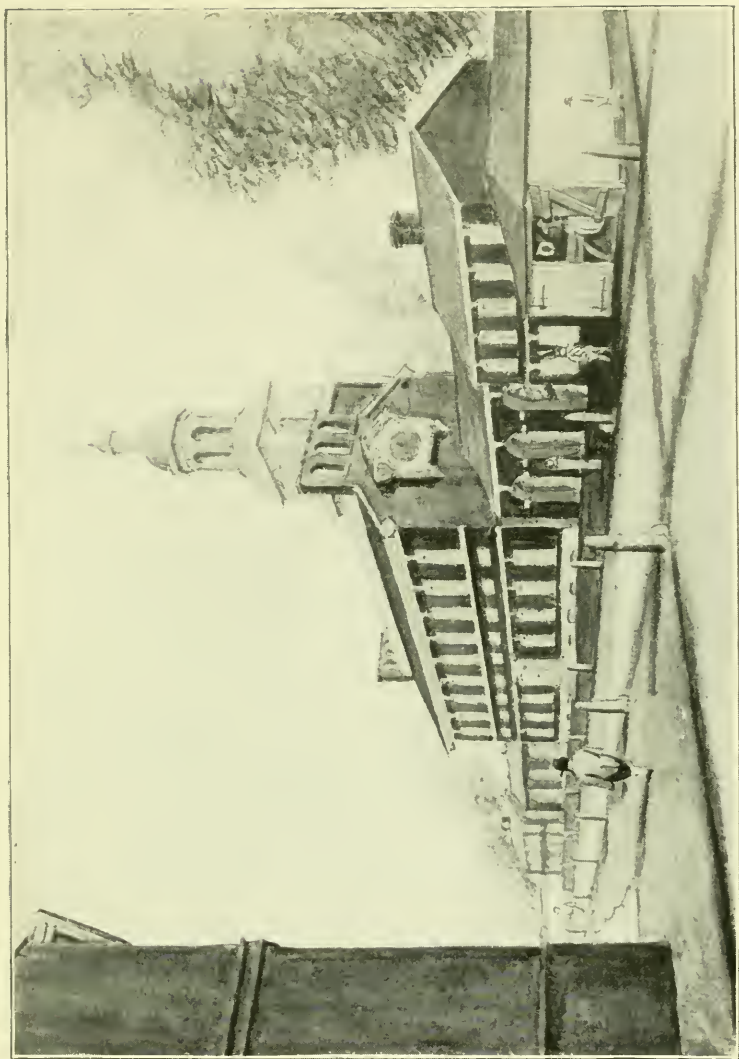
### MEMBER OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE NEW GOVERNMENT OF PENNSYLVANIA

1776

Out near the western edge of Philadelphia, at the State House square, great events were being enacted in that month of July, 1776. Men from every colony could be seen about the north and south entrances of the State capitol and in the hall that joined the two entrances, for in the eastern chamber of the first floor there was, in almost continuous session, the Congress of colonial delegates, carrying out the direction of a war which was already under way, and here they continued to meet during almost all of the revolutionary struggle, while the Americans possessed this temporary capital. Across the hall were the arches of the old Supreme Court room, in which the highest tribunal of the State had sat for over thirty years. Here, apparently,<sup>1</sup> the old Assembly had met since they had granted the Congress the eastern chamber. But the Assembly had adjourned on the 14th of June, and the conference of Provincial Committees, which met four days later, had chosen to meet a few doors farther down the street at the hall of the carpenters' union. This latter meeting, at the close of their session on the 25th, plainly announced that, because of "the sudden and unexpected separation of the late Assembly," it was compelled to undertake provision for the militia called for by Congress, although it did not presume to do more than "recommend" the plans. Practically, however, it became the government of

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<sup>1</sup> One fact which seems to suggest the Assembly's use of this room is that on October 21, 1774, they ordered that the "Bar of the Supreme Court" should be removed and a larger one put in its place. Whether this was in anticipation of the room's use by the Assembly in future or not is not known. Votes of Assembly, Vol. VI.



THE STATE HOUSE AND CONGRESSIONAL CAPITOL AT PHILADELPHIA IN 1778  
Half-tone of painting by R. Peale, once owned by J. F. Watson, of  
Watson's Annals, and now in Independence Hall



Pennsylvania, and, in providing for an election of members to a Constitutional Convention on July 8, it created a body that was to be looked upon at once as that government.

Four days before that election was held the Congress signed a declaration of independence of all the colonies, an act which was, in one sense, scarcely more than the expression of what had already occurred in the minds of most of the people. Consequently, when the newly elected delegates to the Constitutional Convention began to gather in the old Supreme Court room, across the hall from the Congress, on the afternoon of July 15, they at once assumed to represent the people of Pennsylvania, and the Congress recognized the assumption. Dr. Franklin, now an old man of seventy years, stepped across the hall with Colonel Timothy Matlack, as a leader of the Philadelphia delegates. It was not uncommon then for a man to hold many important positions; indeed, the late head of the Carpenters' Hall Provincial Conference was soon to become Chief Justice of one State, Representative of another and President of the Congress, all at the same time. George Ross also came across the hall from the Congress chamber, as head of the Lancaster delegates, as did Colonel James Smith as a delegate for York. Colonel James Wilson, then a young man of thirty-four, remained on the Congress side, as he was not a delegate, and Colonel Thomas Smith,<sup>1</sup> late of the Assembly, a young man of thirty-one years, headed the Bedford delegation of eight members.<sup>2</sup>

The convention was scarcely organized, on the afternoon of Tuesday, the 16th, with Dr. Franklin as president, George Ross as vice-president and Colonel Timothy Matlack as temporary secretary, before the Virginia delegates, across the hall, handed in a proposition for a temporary boundary line, and the Congress sent in communications also. On the fourth day of the convention a committee of eleven persons was chosen to prepare a declaration of rights. These were Mr. Owen Biddle, of Philadelphia; Colonel John Bull, of Philadelphia county; the Rev. William Vanhorn, of Bucks county; Mr. John Jacobs, of Chester county; Colonel George

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<sup>1</sup> Journals of Assembly, Vol. I, p. 49.

<sup>2</sup> Thomas Smith, John Wilkins, Benjamin Elliot, Thomas Coulter, Joseph Powell, Henry Rhoads, John Burd and John Cessna. Journals of the Assembly, Vol. I, p. 49.

Ross, of Lancaster; Colonel James Smith, of York; Mr. Jonathan Hoge, of Cumberland; Mr. Jacob Morgan, of Berks; Colonel Jacob Stroud, of Northampton; Colonel Thomas Smith, of Bedford, and Mr. Robert Martin, of Northumberland, mentioned in the order of age of counties.

The convention took up the matter of delegates to the Congress, reorganization of the Council of Safety, impressing the arms of non-Associators, and in every way became in fact the government of the Commonwealth of Pennsylvania. There were now beginning to be, as in all revolutionary movements, three parties, the extreme conservatives, the extreme radicals and those who attempted a wise constructive course. Colonel Thomas Smith was in the constructive class. The radical wing, on the one hand, was so rapidly growing in power that it reacted to make the conservatives even more extreme, and this made doubly difficult the problems of those who, like Franklin, Robert Morris, Colonel Wilson and Colonel Thomas Smith, were aiming to be wisely constructive.

When the delegates to the Congress, Dr. Franklin, Colonel George Ross, Clymer, Morris, Colonel Wilson, Morton, Dr. Rush, Colonel James Smith and Taylor, were chosen, on the 20th, the committee selected to draft instructions to them were Colonel Timothy Matlack, Colonel Thomas Smith, Mr. James Cannon,<sup>1</sup> the professor of mathematics in the College of Philadelphia; Mr. David Rittenhouse, the astronomer, and Colonel Bull. Immediately following this, Colonel Smith was also made the second member of a committee to confer with the Virginia delegates on the boundary question, the other members being Mr. Rittenhouse, Mr. Alexander Lowrey, of Lancaster; Mr. Biddle, of Philadelphia, and Colonel James Potter, of Northumberland. On the 23d, when the matter of dealing with non-Associators came up, Colonel Smith was placed on a committee to declare what should be high treason and misprision of treason, with Colonel Ross, Colonel James Smith, Messrs. Biddle, Hoge, Clymer and Rittenhouse. To this

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<sup>1</sup> Professor Cannon was born in Edinburgh, Scotland, in 1740. He came to America, and in 1764 entered the Academy of Philadelphia and matriculated in the college in 1767. He became Professor of Mathematics in 1773 and served until his death, January 28, 1782. He was the author of the letters signed *Cassandra*, and became a member of the Council of Safety of Pennsylvania at this convention.





OLD SUPREME COURT ROOM, INDEPENDENCE HALL,  
(Restored)  
in which met The Constitutional Convention of Pennsylvania in 1776



committee, also, was assigned the treatment of counterfeiting and decision of what moneys should be legal tender.

On July 24 an important resolution was passed, which assigned the Committee on the Declaration of Rights, of which Colonel Smith was a member, the duty of also drawing up "a frame or system of government for this State." This placed Colonel Smith on nearly all of the most important committees of the Convention. On the next day, however, after the Declaration of Independence had been ratified, the Committee on Declaration of Rights had reported, and the Committee on Treason had been asked to further amend their report, a very significant addition was made to the Committee on "Frame of Government" or Constitution, in the persons of Colonel Matlack, Professor Cannon, Colonel Potter, Mr. Rittenhouse, Mr. Robert Whitehill, of Cumberland, and Colonel Bartram Galbraith, of Lancaster, a Surveyor of that county.

In order to understand this significance one must recall that there was at this time a rising popular party in Pennsylvania. Franklin's long absence and his attention to inter-colonial affairs since his return had left opportunity for a recasting of State leadership, especially of the rising popular party as opposed to what was often called the aristocratic party. One of the most notable, if not the most influential as a political leader, was the port officer of Philadelphia, George Bryan, at this time a man of about forty-five years. He was a native of Dublin, Ireland, where his father was a well-known merchant. He was a Presbyterian, and letters from his father soon after the son came to Philadelphia show that his family life had been of a most earnest Christian tone. He himself became an idealist in his own life. He had followed his father's footsteps in commerce at Philadelphia, but had failed through the misfortunes of others.<sup>1</sup> He had shown a talent for public life and now soon entered upon it. He had been a member of the Assembly, and in 1764 was one of those who protested against Franklin's appointment as Pennsylvania's agent in London, chiefly on the ground that he would seek to separate from rather than conciliate the mother country. He was, however, a leader in the resistance to Great Britain's aggression and

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<sup>1</sup> *Pennsylvania Gazette*, February 2, 1791.

was a member of the Congress of 1765. His correspondence shows that he was an alert politician, with a large and carefully selected list of correspondents, who kept him informed of the inside movements of both local and continental politics.<sup>1</sup> He was certainly an influential leader of the rising radical popular party in Pennsylvania. It is known that some of these new members were his correspondents, and others are known to have been in sympathy with the popular party. Professor Cannon was of this aggressive radical wing, and with this addition to the Committee on a Constitution or "Frame of Government," it became evident that that element was in control in this convention.

On August 2 there came in a memorial from a township in Bedford county regarding the new frame of government, and on the same day the convention brought the chief feature of the conflict to a close by deciding that the Legislature should consist of "one branch only, under proper restrictions." On the next day Colonel Smith wrote his friend, St. Clair, at Ticonderoga, an illuminating account of it.<sup>2</sup>

"I was favored with yours by Colonel Allen," writes Colonel Smith, "and I thank you for the unreserve with which you communicate your sentiments. I need not say that when I found what turn affairs were like to take in Canada, I was anxious for my friend. I felt for your situation before you wrote. I sincerely believe that the bad success there is owing to the cause to which you ascribe it in your letter to our common friend,<sup>3</sup> for he does me the

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<sup>1</sup> Many of Mr. Bryan's papers have been located in the possession of S. S. Bryan, Esq., of Titusville, Pa., and Hon. Wm. F. Bryan, Mayor of Peoria, Ill. They form a most valuable collection, and not only throw much light on his own life, but on his times also.

<sup>2</sup> "The St. Clair Papers," by William Henry Smith, Vol. I, p. 370, 1882. In a foot-note the editor of these papers says: "Judge Smith was one of the most intimate friends St. Clair had; acted as his legal adviser, in which capacity he often told St. Clair he ought to choose him guardian to look after his finances—so liberal was St. Clair in all money transactions—and held the same political views. Although a member of the convention that framed the Constitution of 1776, he was never reconciled to some of its provisions, and afterward united with James Wilson and Arthur St. Clair in moving for a new Constitutional Convention."

<sup>3</sup> James Wilson, then in Congress, although he was soon displaced, and afterward returned at the request of Gen. Washington.



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BURTON ALVA KONKLE

GEORGE BRYAN

Half-tone of the only known portrait, a painting in  
possession of Mrs. Charles Hodge Scott,  
Germantown, Philadelphia





honor to show me them sometimes; he is a fine fellow, but has enemies—created, I sincerely believe, by his superior talent. Their malice has hitherto been impotent; but they are such industrious, undermining, detracting rascals, that I hardly think they will rest till they have got him out, and a ready tool in his place.

“I have been in town ever since May. I was then chosen Representative for our county. Immediately on my coming to town I fell sick with a very serious bilious colic, which had well nigh done for me. I relapsed so frequently that I was obliged at last to undergo a very severe course of physic, which confined me for two months, and reduced me to a perfect skeleton; but I have every appearance of enjoying a more perfect state of health than I have for some years. Hardly was I able to walk about when the convention met. I was chosen one of them—a pretty solon you will say. No matter, we have now sat three weeks, and agreed upon the fundamental principles of our Government. They are somewhat singular, however. The most of us have not had our judgment warped in favor of any other, and not a sixth part of us ever read a word on the subject. We are only to have one Legislative branch, viz: the Assembly, who are to be chosen annually, and a rotation to take place every three years. Instead of having a Legislative Council, it seems we are to have a convention every three, five or seven years (it is not yet settled which), who are to inquire into and supply defects, deviations or abuses in the Constitution. In what manner the executive and judicial are to be chosen I can not yet say, as we only settled the other points last meeting. I was in a small minority.<sup>1</sup> I believe we might have at least prevented ourselves from being ridiculous in the eyes of the world were it not for a few enthusiastic members who are totally unacquainted with the principles of government. It is not only that their notions are original, but they would go to the devil for popularity, and in order to acquire it, they have embraced leveling principles, which you know is a fine method of succeeding. Don’t, therefore, be surprised if in

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<sup>1</sup>The editor of “The St. Clair Papers,” who evidently had access to letters not included in his published list, says that Colonel Smith especially opposed the single branch feature and the restriction on the executive.

the next letter I write to you, I should inform you that we had passed an Agrarian Law.

"With regard to anything in the civil line that may concern you, I hardly think the convention will do anything, but it must rest over until the new government is formed and the supreme executive appointed. Should anything of the kind come upon the carpet while I am present, I hope you will not be overlooked. I am in hopes a temporary line between us and Virginia will be soon settled by the two conventions. I am one of a committee to confer with their delegates on the subject. They are authorized by this convention, and made the proposal—the bearer will inform you what line they proposed.

"Mrs. St. Clair came soon to Bedford after I went up, and before you went away. You know there is nothing coming in from the office; however, the bearer will mention that matter to you. I really wish to see you again. I have some reason to hope that you will soon be advanced to a higher rank."<sup>1</sup>

The real political forces which were forming this constitution were not all in the convention itself, nor, indeed, was the most powerful part there, as has been said. This constitution "was understood to have been principally the work of Mr. George Bryan, in conjunction with a Mr. Cannon, a schoolmaster," says Alexander Graydon in his "Memoirs,"<sup>2</sup> "and it was severely reprobated by those who thought checks and balances necessary to a legitimate distribution of the powers of government. Doctor Franklin was also implicated in its production; and either his participation in it, or approbation of it, was roundly asserted by its fautors. The Doctor, perhaps a skeptic in relation to forms of government, and ever cautious of committing himself, had thrown out an equivoque about a wagon, with horses, drawing in opposite directions; as, upon the adoption of the Federal Constitution he told a pleasant story of a self-complacent French lady who always found herself in the right. But whether he meant by his rustic allusion, to show his approbation of checks

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<sup>1</sup> St. Clair was made Brigadier-General by the Congress just a week later.

<sup>2</sup> "Memoirs of His Own Time," etc., second edition, edited by John Stockton Littell, p. 285, 1846.

or otherwise, is an enigma that has never been solved; nor is it worth the trouble of solution."

"With respect to Mr. Bryan," he continues in his interesting, if cynical, tone, "so conspicuous at this era in the home department, he was one of those, whose memory treasures up small things, with even more care than great ones. He was said to be a very diligent reader, and was certainly a never weary talker, who, in the discourses he held, seldom failed to give evidence of an acquaintance with the most minute, recondite, and out-of-the-way facts; insomuch, that a bet was once offered, that he could name the town-cryer of Bergen-op-Zoom. As Ireland had given him birth, he was probably like the bulk of his emigrating countrymen, in the antipodes at all points, to whatever was English; and a staunch patriot, of course. It was, moreover, his passion or his policy, to identify himself with the *people*, in opposition to those, who were termed the *well-born*, a designation conceived in the genuine spirit of democracy, and which, as it may be supposed, did yeoman's service to her cause, now dispensing with its use from a just deference to its well born advocates from Virginia and her dependencies. In other respects Mr. Bryan was well enough: let us say, a well meaning man, and even one, who, in the main, felt he was acting the patriot: for this part, it is well known, is played in very different styles. \* \* \* Of his colleague Mr. Canon, it may not be uncharitable to presume, that having the little knowledge of men, and scholastic predilection for the antique in Liberty, which generally falls to the lot of a pedagogue, he acted accordingly. \* \* \* These constituted the duumvirate, which had the credit of framing the Constitution \* \* \* ."

Of course, Mr. Bryan was not a member of the convention, but as a political leader of the popular party he could of course act through Mr. Cannon (who had made a name by his *Cassandra* letters in the *Gazette*) and other representatives of his party in the convention. Certain it is that no one stood for the instrument formed by this body so persistently and successfully, for the next fifteen years, as did Mr. Bryan, nor was any one as generally considered responsible for it as he. The single-branch Assembly, which was not the form believed in by the best

thought of the day, was no doubt a concession to the popular regard for the old Assembly, which had stood so long as the bulwark of their liberties.<sup>1</sup>

While the committees were at work on the Constitution, the Committee on Instructions to the Congressional Delegates, of which a majority was composed of those added members of the Constitutional Committee, handed in a report which was adopted the next afternoon, the 26th of July. It directed the delegates, among other things, to work toward a "perpetual confederation," which would at the same time secure to each colony "the perfect direction of its own internal police." By this time, however, in the convention there was but one voice on continental affairs; the differences were on the Constitution itself.

On August 22 Colonel Smith wrote his friend, General St. Clair, more about it, in a letter congratulating him on his promotion.<sup>2</sup> "I was favored with yours last night by Captain Rippy," the letter reads. "I now know by experience, what I always believed, that elevation does not make you forget your friends. You will, perhaps, be of opinion that I am not that sincere friend you take me to be, when I inform you that the intelligence you gave me on that head gave me far less pleasure than you supposed it would; the reason is, I knew it long before, for no sooner was you appointed Brigadier-General but our worthy friend Wilson communicated the agreeable news to me, upon which I wrote to most of our friends to whom I knew the news would give pleasure.

"It is not your elevation alone that I congratulate you upon; but I can assure you, from undoubted authority, that your military character stands as high with Congress as that of any general on the continent, and I flatter myself that you have as good a chance for even a more elevated rank than that to which you are lately raised. Whatever has been said, or whatever may be said to the contrary, I think every man's own heart will tell him that self has a considerable share in the direction of all our thoughts

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<sup>1</sup> This also was a feature of the theory of one school of government at that time.

<sup>2</sup> "The St. Clair Papers," by William Henry Smith, Vol. I, p. 373, 1882.

and actions. I feel an instance of it upon this occasion, for though I do sincerely rejoice at the elevation of a much esteemed friend, yet I am not without my fears that I shall by that means be deprived of the pleasure which I enjoyed in the company of that friend."

Then he takes up the work of the convention. "I feel the truth of your sentiments with regard to the Constitution that we are about framing," he continues. "In several sects of religionists in the different ages of the world, and in some even now, *inspiration* was supposed to have a considerable share in the direction of their actions, and they very gravely supposed themselves gifted with it.<sup>1</sup> I believe we shall have the honor of first introducing the same doctrine into modern politics. A motion was made, without a blush, by a member, that whatever might require the consideration of the House might be printed before any resolve was passed upon it, for the use of members, as several of them could read *print* better than writing. Our principle seems to be this: that any man, even the most illiterate, is as capable of any office as a person who has had the benefit of education; that education perverts the understanding, eradicates common honesty, and has been productive of all the evils that have happened in the world. In order that inspiration may be our only guide, every person who is to be chosen into any office that was formerly supposed to require some degree of human knowledge and experience to enable the person to execute it with justice—every such person, I say—is to be turned out before he can possibly acquire any experience—e. g. in the form of government now debating in the House. The committee have brought in one article, that the justices of the peace shall be chosen by the people in the respective districts wherein they reside; turned out every seven years and a new set chosen in the same manner. We are not come to it yet, but by the complexion of the House I have reason to think it will pass. We are determined not to pay the least regard to the former Constitution of this Province, but to reject everything therein that may be proposed, merely because it was part of the former Constitution. We are resolved to clear every part

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<sup>1</sup> Colonel Smith was himself an Episcopalian.



of the old rubbish out of the way and begin upon a clean foundation. You know that experimental philosophy was in great repute fifty years ago, and we have a mind to try how the same principle will succeed in politics. You learned fellows who have warped your understandings by poring over musty old books, will perhaps laugh at us; but, know ye, that we despise you.

"The situation of this country," he adds, "as well as that of *blind* Britain, must give great anxiety to every person who is not callous to the feelings of humanity. They seem to have been in the same situation for some time past with regard to their intellects as the builders of Babel were in respect of their [ ].<sup>1</sup> God knows how the destructive dispute will end. I think the ruin of Britain is inevitable, and her existence as a powerful Kingdom is near at an end. We will undoubtedly feel sorely the effects of the dispute; but I can not help being of opinion that, according to the course of human affairs, we must, in the end, prevail."

"As for myself," he adds in closing, "I have the honor to serve the public and receive nothing for it; but that it puts it out of my power to serve myself by going to the woods, for, as there is at present, and like to be through our great wisdom, a suspension of all law for a considerable time, nothing is to be done in that channel, and from the temper of the times no person has any security, let his conduct have been what it will, that he will not be superseded by any being of a day."

On September 2 Colonel George Ross, the Vice-President of the convention, and Colonel Thomas Smith were made a committee to form an ordinance enabling Justices of the Peace to compel debtors to give security to creditors, and on the following day Colonel Smith was one of those appointed as a Justice for Bedford county. On the 5th the Committee on Treason reported finally, and its ordinance was adopted, and on the 9th it was voted that non-Associators pay twenty shillings a month as a species of war tax.

At this point it seems desirable, in order to appreciate

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<sup>1</sup> There seems to be no reason why this might not be "theirs," although the editor of "The St. Clair Papers" seems to think some word missing.



the difficulties of the situation at Colonel Smith's home, to interrupt consideration of the work of the convention and glance at the frontier. The Congress had made Jasper Yeates, of Lancaster, and others Commissioners of Indian Affairs for the Middle District, and they were now at Pittsburgh. They found that there was every probability of an Indian war; that in the whole vast territory to the west and northwest they were considering which side to take, and were inclining toward the King. Still more, they found that the long-continued friction between the Virginia and Pennsylvania settlers about the forks of the Ohio had finally led many of them, about the beginning of July, 1776, to contemplate the formation of an independent State, and to efforts to secure a memorial to the Congress for a new State to be recognized, to be known as "the Province and Government of Westsylvania."

"Beginning at the Eastern Branch of the Ohio opposite the mouth of the Scioto," says the description of the bounds of the proposed government, "& running thence in a direct line to the Owasioto Pass, thence to the top of the Allegheny Mountain, thence with the top of the said Mountain to the Northern Limits of the Purchase made from the Indians in 1768, at the Treaty of Fort Stanwix aforesaid, thence with the said limits to the Allegheny, or Ohio River, and thence down the said River as purchased from the said Indians at the aforesaid Treaty of Fort Stanwix to the Beginning."<sup>1</sup> The memorial further describes it as "a Country of at least 240 miles in length from the Kittaning to opposite the mouth of the Scioto, 70 or 80 in Breadth from the Allegheny Mountain to the Ohio, rich, fertile & healthy, even beyond credibility & peopled by at least 25,000 Families since the year 1768 (a population we believe scarce to be paralleled in the Annals of any Country)."

They even went so far as to call a convention to organize a new government. "Whereas the Situation of this country," reads the advertisement, "hath been hitherto very unhappy for proper Regulations: and whereas there is now

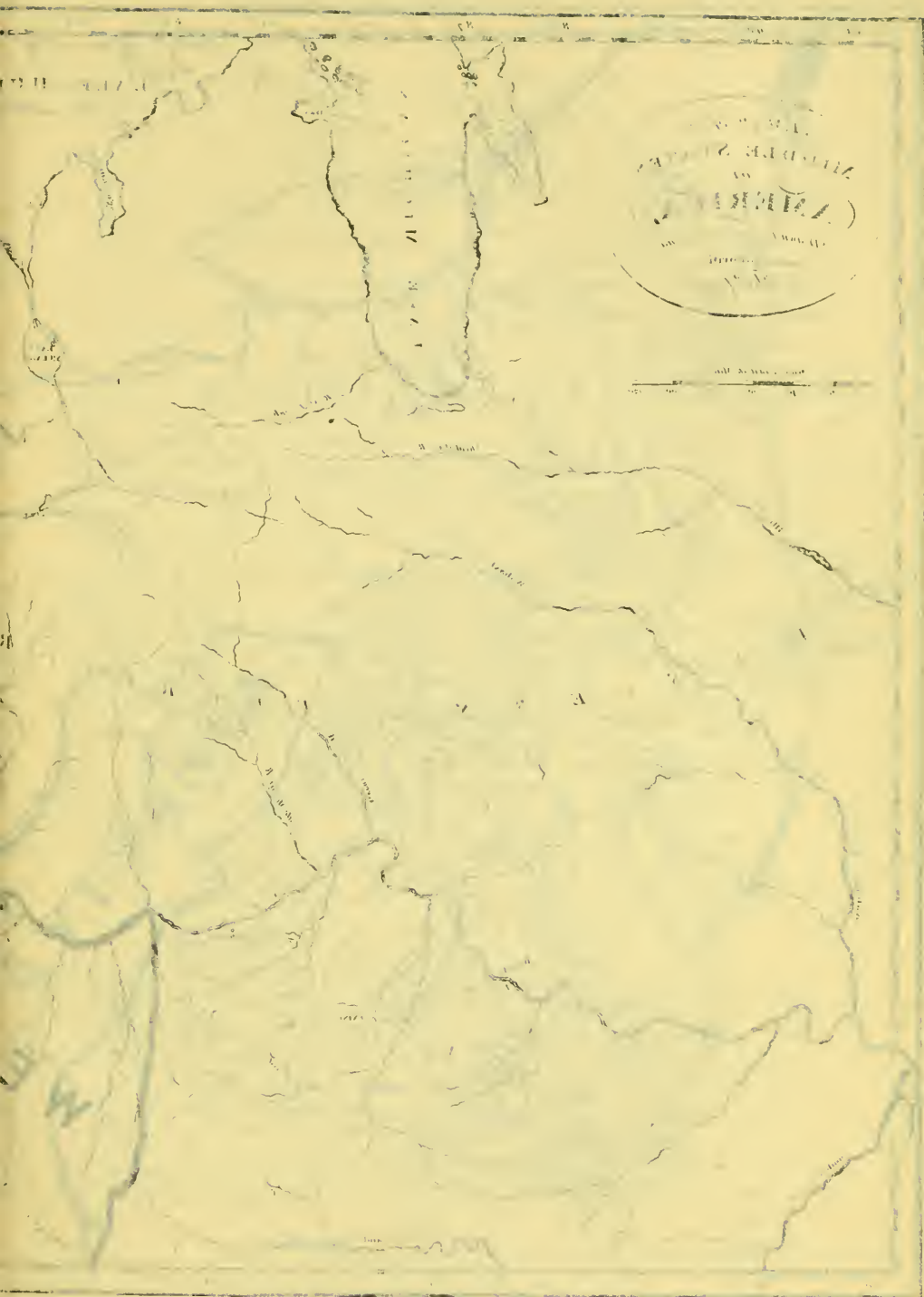
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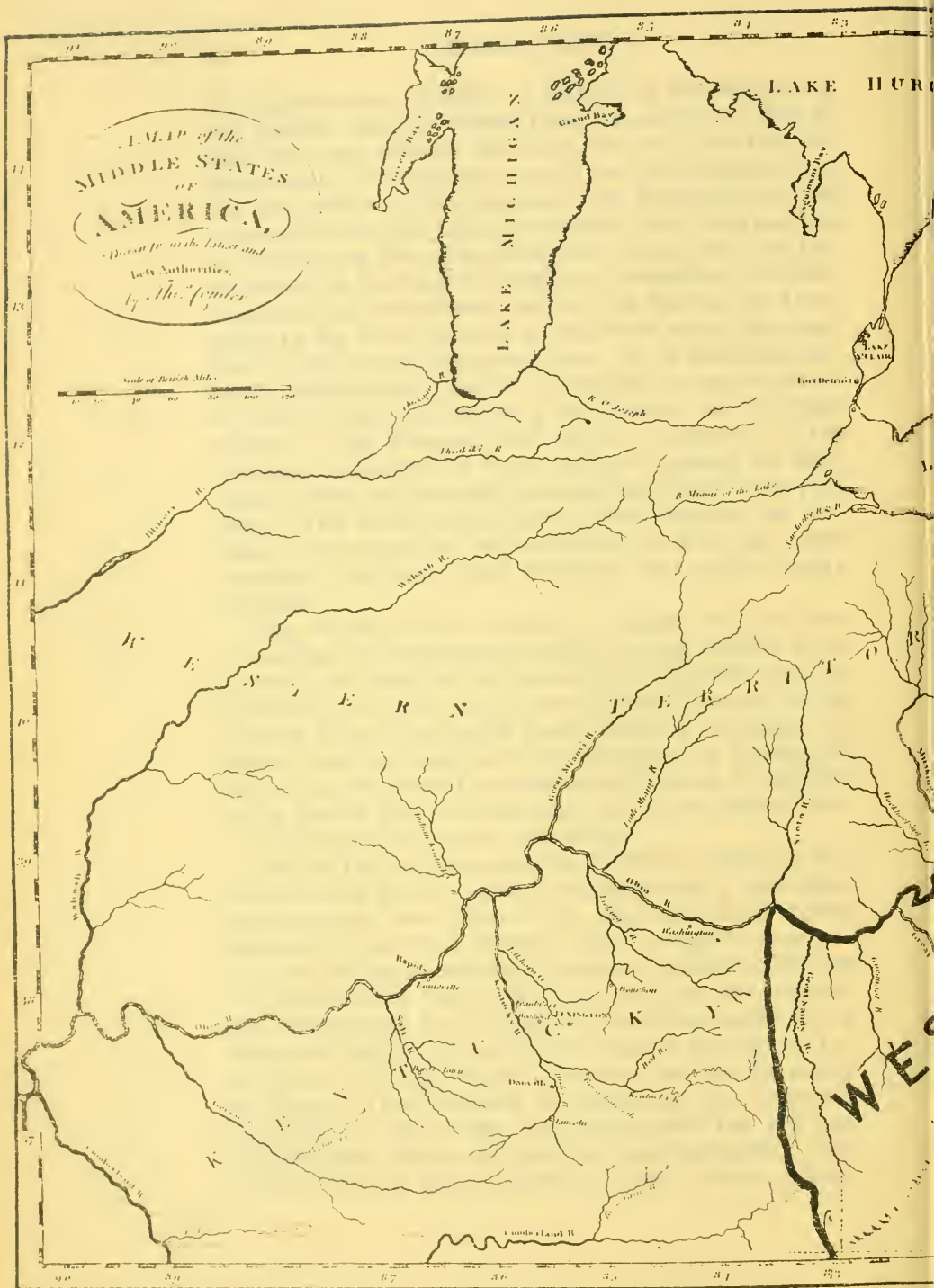
<sup>1</sup> From the copy of "The Memorial of the Inhabitants of the Country, West of the Allegheny Mountains" to the Congress, among the Yeates Papers, 1744-1776, at the Pennsylvania Historical Society. These copies are in Mr. Yeates' own hand.

an opportunity of Regulation offered by the Resolve of the Honble., the Continental Congress of the 15<sup>th</sup> Day of May last: and whereas there are now on Foot two different modes for obtaining the said necessary Regulations; the first mode is a joint petition of the Inhabitants of this Country to the said Congress praying their Interposition in settling the Disputes which have occasioned our Unhappiness, & the Second Mode is by immediately colonizing ourselves by our own Authority, & finding our Delegates to the said Congress to represent us as the fourteenth link in the American chain: It is therefore sincerely recommended that they assemble at suitable places in each district on August 9 and choose one of these modes." This, however, was met by a memorial of the Virginia committee of West Augusta county to their Lower House of Assembly warning them against the program. This it was, undoubtedly, which brought the Virginians so quickly to the convention as soon as it was organized, and also which prompted that body's hearty response.

This action, however, came to naught, and was but a symptom of the alarming attitude of the Indians, news of which was sent to the convention and acted upon on September 10. That body made Colonel Thomas Smith, Colonel Potter and Major James Smith a committee to confer with the Congressional Committee on Indian Affairs as to what should be done for the frontier, in addition to the former action setting aside the Westmoreland and certain Bedford troops for that service.

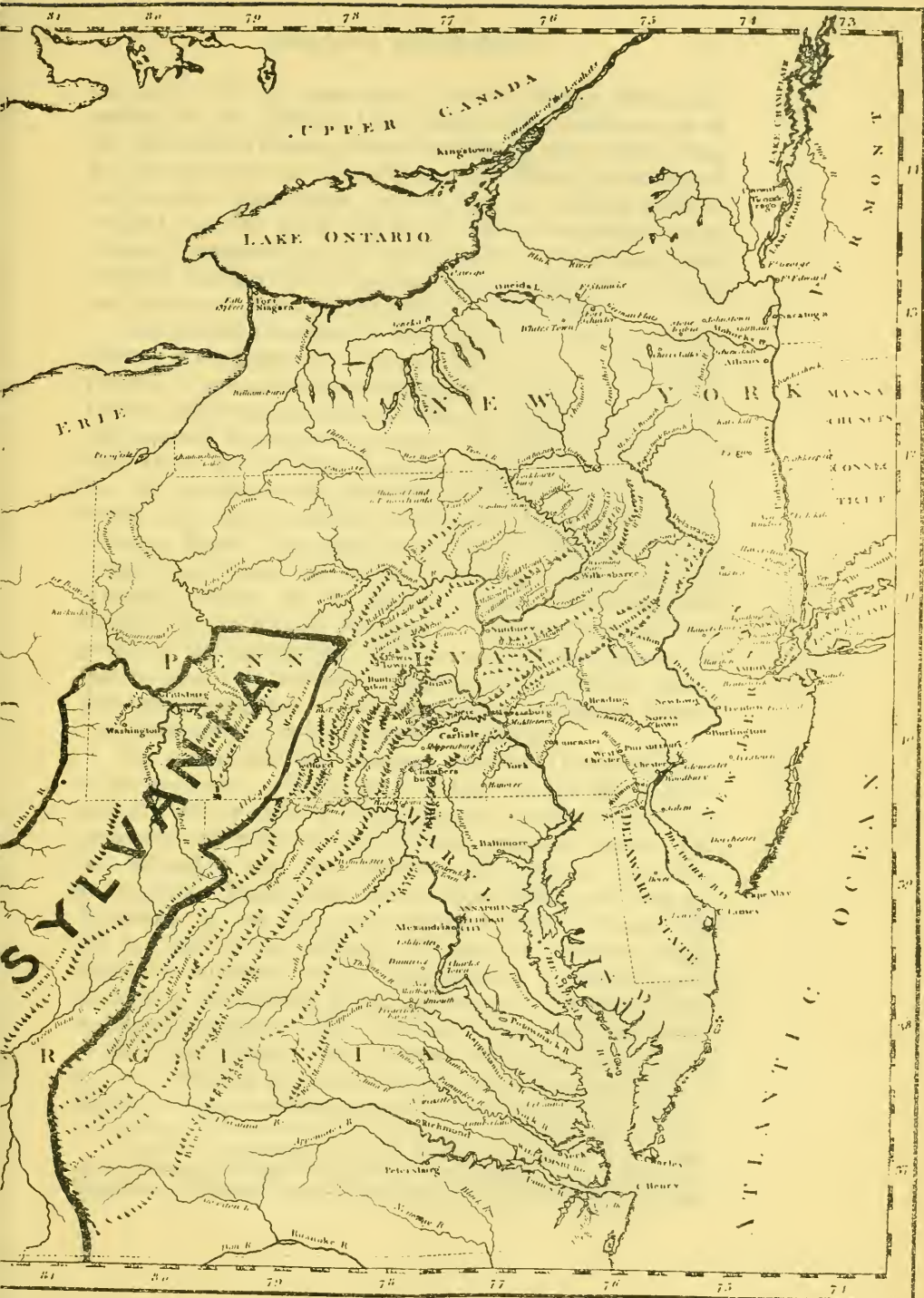
On the 13th of September the creditors' ordinance was reported and passed, making imprisonment a possibility when security was refused. On the 14th the Virginia Boundary Committee reported that overtures were received to accept a temporary boundary somewhat like the one proposed by Lord Dunmore, and that the convention's committee had brought a counter-proposal for a temporary line to be surveyed as near as possible to the true line, which the Virginia delegates had not the power to accept. Then followed the report of Mr. Cannon's committee, to which the non-Associators' tax bill had been assigned, after recall from the other committee. Mr. Cannon and his fellow-members made a more drastic





THE PROPOSED STATE OF WESTSYLVANIA, DRAWN ON A MAP OF 1794 IN COOPER'S  
AT THE PENNSYLV









measure. On the same day Colonel George Ross, seconded by Mr. Clymer, tried to get a reconsideration of the one-branch feature of the Legislature, but in vain. Day by day the work in Committee of the Whole was devoted to the new Constitution, and on the 23d, when it became evident that the work was nearly done, a committee was chosen, composed of Colonel Matlack, Mr. Jacobs and Colonel Thomas Smith, to draw up an ordinance carrying out elections under the proposed Constitution.

The drastic measures of Mr. Cannon's committee soon stirred the supposedly defunct Assembly to action, although it was apparently impossible to secure a quorum. On the 24th twenty-nine met—there seems to be no record where—and attempted to vote the budget which carried £1,000 for the late Governor John Penn. Many of the old members, who had declared the Province a free State, took care to attend, and among them was Colonel Thomas Smith. He and eleven others voted against the budget, but it was carried by a majority of four, and the Assembly broke up on the 26th, after considering the budget in detail and passing a resolution against the power of the convention to tax or to grant such power of imprisonment to Justices as appeared in the drastic measure recently passed. This was only a resolution passed "by a majority of those present," however.

The convention was supreme, and Mr. Cannon's associates in control. On the 25th, to Mr. Cannon, Mr. Jacobs and Mr. Rittenhouse was assigned the preparation of the preamble and forms of oaths of allegiance and office. On the following day the Elections Committee reported, among other things, that the elections should be held on November 5, and that each elector should take an oath not to "directly or indirectly do any act or thing prejudicial or injurious to the Constitution or government thereof, as established by the convention," and their ordinance was adopted. The Constitution was to be ordained—not voted upon. Mr. Cannon, Mr. Rittenhouse and Colonel Matlack were to write the announcement to the public, and the convention rose on the 28th of September.<sup>1</sup>

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<sup>1</sup> The old Constitution of 1776 is still preserved in the office of the Secretary of the Commonwealth at Harrisburg. It gives the impression of having been a long roll, afterward cut into thirteen

October developed great and vigorously expressed variety of opinions on the new instrument. Colonel Smith objected to it strongly, but attempted to take a wise course, thinking it better to accept the inevitable for a time, until a new convention could be secured. Some, however, counselled resistance to the election, even among those who were strong supporters of the revolution. A meeting, at which Colonel John Bayard was chairman, was held in the State House yard on the 21st and 22d of October, protesting against the work of the convention.<sup>1</sup> It was resolved, among other things, that the "convention assumed and exercised powers with which they were not entrusted by the people;" that the Constitution "*unnecessarily* deviates from all resemblance to the former government of this State," when they were just to remove Kingly authority; that it was different "*in many important articles* from EVERY government that has lately been established in *America* on the authority of the people—from the sentiments of the Honourable the Continental Congress respecting government—and from those of the most distinguished authors, who have deliberately considered that subject." They attributed the alarm of a great many people and the resistance of many more to the "strange innovations" of the new instrument, and advised against election under it, together with an immediate calling of a new convention.

An interesting foot-note commentary explains that the Constitution differs "from others lately formed in these particulars: 1<sup>st</sup>. It establishes only a *single* legislative body. 2<sup>dly</sup>. It renders the *judicial* dependent on that *single* legislative body, who may remove any judge from his office, *without trial*, for anything they please to call 'misbehavior.' 3<sup>dly</sup>. It renders the *executive* dependent on that *single* legislative body; by whom alone the *executive* officers are to be paid for their services,—and by whom, from the great disproportion between the members of the Assembly and Council, the President and Vice-President must always be

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quarto sheets. Franklin signed each sheet at the bottom, and at the close are all the signatures in full, each county signing in groups, with twelve seals. Views of the first page and that on which Colonel Smith's signature appears are given herewith.

<sup>1</sup> *Pennsylvania Gazette*, October 23, 1776.

Whereas all good Governments ought to be instituted and supported  
for the Security and Protection of the Liberties of each one to enable the Individuals  
who compose it to enjoy their Natural Rights and the other Blessings which the Author of Existence  
has bestowed upon them. And whereas these great Ends of Government are not obtained till  
the People have a Right by common Consent to change it and take such Measures as to them may  
appear necessary to promote their Safety and Happiness. And Whereas the Inhabitants  
of this commonwealth have in Consideration of Protection only heretofore in a limited Allegiance  
owed to King of Great Britain and the said King has not only by his Warrant that protection  
not committed and still continues to carry on with unabated Violence a most cruel and  
Oppressive War upon them contrary to the true Intent and Spirit of the said British Constitution  
Whereas likewise it is shown for the avowed purpose of reducing them to a total and total  
Subjection to the avaricious Domination of a British Parliament with many other Acts of  
oppression now laid out forth in the Declaration of Independence by all Allegiance and Fidelity  
to the said King and his successors are depolled as well as true and just Government authority  
derived from him and in those promises. But Whereas it is absolutely necessary for the Welfare  
and Safety of the said State that they become with them an Independent  
State and that just permanent and superior form of Government be established  
then derived from and founded on the Authority of the People only agreeable to the Principles  
of the Revolvable American Congress. In the Representatives of the Freemen  
of Pennsylvania in General Convention met for the Express purpose of forming  
such a Government as might be the greatest of the great Governor of the Universe (who alone  
knows to what degree of Liberty Happiness mankind may attain by perfecting the form of Govern-  
ment) in permitting the People of this State by common Consent and without Violence to be bound  
to form for themselves such just Laws as they shall think best for governing their future Society  
and being fully convinced that it is one Indivisible duty to establish such Original  
Principles of Government as will best promote the general Happiness of the People of this  
State and their Posterity and provide for future improvements without partiality for or pre-  
judice against any particular class of men or denomination of men whatever. Do by virtue  
of the Authority vested in us by our Constituents Ordain Declare and Establish  
the following Declaration of Rights and frame of Government to be the Constitution of  
this commonwealth and to remain in force therein forever Unaltered except in such  
Articles as shall hereafter on Experience be found to require Improvement and which shall  
by the same Authority of the People fully Delegated to this power of Government be  
amended or improved for the more Effectual obtaining and securing in quietness and  
Order of all Government herein before Mentioned

Philadelphia 21

First Page of The Pennsylvania Constitution of 1776.  
Half-tone of original among the  
Archives at Harrisburg



Cumberland County

John Harris

Jonathan Hoge

John Clark

Robt. Whitehill

William Duffels

James Brown

Hugh Alexander

Sam. Wene

Berks County

Jacob Morgan

Gabriel Kuster

Benjamin Spangler

Valentine Eckert

Charles Shoemaker

John Jones junr

Northampton County

Amos Jacobus

Isaac Orndt

Abner Burkhalter

Jacob Shorad

Reigal Gray

Abraham Witten

John Ralston

Bedford County

Benja. Elliott

Thomas Cantler

Joseph Powell

Sam. Bred

John Cune

Wm. Withers

Thomas Smith

Northampton County

John Cook

John Potter

John Martin

Matthew Brown

Walter Clark

John Kelly

James Crawford

John Miller

Westmoreland County

James Barr

Charles Cook

John Smith

John Moore

John Carmichael

John McGillis

John McGillis

Last Page of The Pennsylvania Constitution of 1776,  
Signatures

Half-tone of the original among the  
Archives at Harrisburg





annually chosen,—besides, that every officer, *executive or judicial*, may be impeached *by the Assembly*, before *six* of the Council *thus dependent on the Assembly*, and be tried and condemned. 4<sup>thly</sup>. It erects no *court of appeals*, more necessary here than in some other States, as our Supreme Court may try causes in the first instance, and finally determine them, so that there is no mode settled for correcting their errors.” The writer quotes Montesquieu on the separation of legislative, executive and judicial functions, and closes with a prediction that the power vested in the Council of Censors, and the convention that may be called by them, “will occasion convulsions in the State.” These extracts are sufficient to show the general tenor of opposition, an opposition that was to be as long continued as the defense and until its efforts were crowned with success.

The defenders of the new Constitution were equally active. The defense by Professor Cannon’s committee has, unfortunately, not been found. One who writes anonymously, as was the prevailing custom, says, among other things, in reply to “Brutus,” who especially attacks the oath of electors, “The constitution is now formed and the Convention dissolved, the last attempt to defeat all our measures is to prevent an election. Other Conventions either resolved themselves into Assemblies and undertook to appoint officers of State—though not appointed for that purpose; or sat until it took place.—Our Convention trusting to the virtue of their countrymen, on finishing their work dissolved themselves.—Our enemies, if they could prevent an election under the new form, would gain their point, as all things must in consequence run into immediate confusion.—Brutus appeals to the people and hopes to prevail on them by misrepresentation and artifice to effect this, by making them believe that an oath which can prevent none but our enemies from voting, is arbitrary and criminal.”<sup>1</sup>

On October 30, “Consideration,” another defender, writes, *inter alia*, that those who opposed the new frame, when they could find nothing worse, concluded it must “be a vile thing, because a certain Schoolmaster had a principal hand in forming it,” but he reminds them that Mr. Cannon is “a learned, sensible and disinterested Patriot,” and that

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<sup>1</sup> *Pennsylvania Journal*, October 9, 1776.

they "quite forget Dr. Franklin and David Rittenhouse, A.M., were in the Convention," although they do "remember Colonel Matlack, but only to inform the true proprietors of dominion (the rich) that the fellow is an upstart and does not keep a chariot." He closes by remarking: "'Tis time enough to have it amended when experience and cool reflection on all the arguments for and against it can ripen your judgments for so weighty an affair."<sup>1</sup>

November brought the Assembly election, and when they met, in the same old Supreme Court room used by the convention, on November 28, Colonel Thomas Smith, Dougherty, Elliot, Espy, Woods and Rhoads, the old-time leaders in Bedford county, were returned. John Dickinson, Robert Morris, George Clymer and John Bayard were among those from the city and county of Philadelphia, while the rest of the returns showed the popular party still in control, but a considerable number, also, of those opposed to the Constitution. Scarcely more than a quorum appeared, and even by December 3 there was none, so that about all they did besides organization was to push forward the non-Associators' tax bill. Was this Assembly to be killed by no quorum, as the old one had been? Colonel Smith and many others who believed as he did were evidently not there. Almost no business was done even when a quorum was present. It is true that there was great alarm over the approach of the contending armies. The Congress became so alarmed by the 12th of December that they sent Colonel Wilson across the hall to the Assembly and to the Council of Safety up stairs, to say that they proposed removing to Baltimore, to meet there on the 20th of December.

A month before this, namely, on November 11, the Council of Safety of Pennsylvania had received intelligence of the forward movement of General Howe toward Philadelphia, and efforts were at once made to prepare for defense. The Associators' militia were placed in readiness, and this required many of those elected to the Assembly to act in their various military capacities. Colonel Thomas Smith, while he was in the convention in July, had been succeeded as Colonel of the Second Battalion of Bedford

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<sup>1</sup> *Pennsylvania Gazette*, October 30, 1776.

by Colonel George Woods. Colonel Smith served in various capacities in the preparation of the troops and acted at times among the field officers as Lieutenant-Colonel, as did Woods, Piper and McAlevy.<sup>1</sup> The continual reorganization of the frontier service, because it was partly for the frontier and partly for the State and continental troops, made frequent changes necessary, the records of which are not complete.

But, to return to the doings of the Assembly, the alarm of the Congress extended to them, for "from the 14th day of December, 1776, until the 13th day of January, 1777, a quorum of the members did not appear in the House, occasioned by a number of the members being officers in the militia, who were under obligation to attend in the army, and a number of the members returned home to bring out the militia of their respective *counties* (the enemy approaching towards this city), and the committee appointed to bring the public *treasury* back to this place from Baltimore: although a number met and adjourned from day to day."<sup>2</sup> The Council of Safety—for no Supreme Executive Council had met yet—was the executive government of Pennsylvania, Thomas Wharton, Jr., being president of this Council and David Rittenhouse, vice-president. Among those active in it at this time were Bayard, Matlack, Cannon, Biddle and others.

With the opening of 1777, however, the Assembly met and did more work than before. They made David Rittenhouse State Treasurer on January 14. On February 5 they elected Robert Morris, Benjamin Franklin, William Moore, Jonathan Bayard Smith and Daniel Roberdeau delegates to the Congress, and the following day recorded, with some irony, Robert Morris' acceptance of the post—an explanation of which will presently appear. On March 4 the Supreme Executive Council first met, and at once entered the Assembly in joint session to elect a President and Vice-President. Thomas Wharton, Jr., and George Bryan were chosen to the respective offices, and they were proclaimed at the court house the next day, March 5. With this event the government of Pennsylvania, under the new Constitution, was an accomplished fact. The pop-

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<sup>1</sup> Pennsylvania Archives, Second Series, Vol. XIV, p. 644.

<sup>2</sup> Minutes of Assembly of latter date.

ular party were now in full control, and their aggressiveness and vigor, which soon became manifest, were due, in very large measure, to the new Vice-President, Hon. George Bryan.

## VII

### OPPOSITION TO THE RADICAL PARTY AND THE CONSTITUTION OF 1776

1777

On the very morning of March 5, when the proclamation of President Wharton's and Vice-President Bryan's accession to office occurred at the court house, the Assembly received a petition from Attorney Robert Galbraith, of Bedford, asking that he be given the offices of Recorder and Register for that county, held by Colonel Thomas Smith. This was the first note of warning that Colonel Smith's opposition to the Constitution was to be punished. It was followed on March 17 by the appearance of Colonel Smith, Colonel Woods and Mr. Rhoads, members of Assembly for Bedford, with a remonstrance. This was met by a counter-petition from the Constitutionalists, or Bryan followers, on the 20th, asking for a new election of representatives from that county. The anti-Constitutionalists were so formidable in Bedford county, however, that the Assembly at once did something probably never done before or since, ordered that "seventy copies of the Constitution of this Commonwealth be procured, sent up and dispersed among the inhabitants of the county of Bedford," as a species of missionary literature, evidently thinking that the opposition arose from ignorance of its provisions, when, in fact, it arose from a very thorough knowledge of that instrument.<sup>1</sup> "But to settle the matter fairly," wrote a pungent defender of the Constitution under the signature "Demophilus," against one "Phocion," "and in good earnest to determine whether the majority of the people are dissatisfied with the Constitution on

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<sup>1</sup> Although Bedford was the only county singled out in this way, later copies in both English and German were sent to all counties. Journals of Assembly, Vol. I, p. 145.

reasonable grounds, take the Constitution, paragraph by paragraph, and *expose its defects throughout*, and at the expense of your *patriotic* party, serve every district in the State with a printed copy of the work, and we, the *contents* with the present Constitution, will, at our expense, lay a vindictory appeal before the public, and then, after a sufficient time is given to have a judgment on the real merits of the little book, if you can obtain a majority of the Freemen of the State of Pennsylvania to petition for the calling of a new Convention to alter the Constitution, I will with heart and hand promote the reformation, to the utmost of my power:" and if they will not do it he purposes to consider them "enemies" and "pests of society."<sup>1</sup>

The opposition was by no means confined to Bedford, although that county seemed to be the object of more solicitude than any other, possibly because the strongest element there in character and influence were pretty thoroughly united against it. "The Difference of sentiment which prevails in Cumberland county about the Constitution," wrote Ephraim Blaine to President Wharton about this time, "and the Ill Judg'd appointment of part of the Sub Lieutenants, are my Principle reasons for not Accepting for the present, the Commission your Honor and the Council were pleased to offer me of the Lieutenancy." There were others of what proved to be equally "Ill Judg'd" appointments, and one of these was the selection by the Supreme Executive Council on March 21, of Attorney Robert Galbraith, then of York, as Prothonotary of Bedford county. It is notable, too, that in the appointment of a successor to St. Clair in Westmoreland it was carefully agreed that the incumbent should resign the office to him if he returned.<sup>2</sup> This choice of Galbraith was resented by the strongest element for a good many reasons, so that there was no business done in the office of Recorder for over a year, and Colonel Smith was justified by the people in refusing to give up the records.<sup>3</sup>

<sup>1</sup> *Pennsylvania Gazette*, March 19, 1777.

<sup>2</sup> Colonial Records, Vol. XI, p. 187.

<sup>3</sup> Hon. William P. Schell, in his notes on Bedford county, says there was "a period extending from the 9th of October, 1776, to the 22d of April, 1778, during which no business was done in the office."



He was, however, not spending any time in this matter. The events following the successes of General Washington at Trenton and Princeton, in which General St. Clair won a Major-Generalship, during the past winter, and the approach of the enemy, made it necessary to draw heavily on Pennsylvania for supplies. In February, General St. Clair writes James Wilson from the camp at Morristown, N. J., that "Tom Smith is here." It is probable that this visit was in connection with the Quartermaster service, as Colonel Smith became connected with the department during the year, and was stationed at Bedford as Assistant Deputy Quartermaster-General under Deputy Quartermaster-General John Davis at Carlisle.<sup>1</sup>

"Pennsylvania is in the greatest confusion," wrote James Wilson to St. Clair on March 27, after he had resumed his seat in Congress. "Perhaps order may, at last, arise from it. The very critical situation of public affairs is of much advantage to the Assembly and their friends."<sup>2</sup>

"The disaffection in Pennsylvania," wrote General Washington, "which I fear is much beyond anything you have conceived, and the depression of the people of this State [New Jersey], render a strong support necessary to prevent a systematical submission; besides the loss of Philadelphia would prove a very great injury, as we draw from thence almost all our supplies." "As to the politics of Pennsylvania," wrote Wilson to St. Clair in July, "they are not in the situation I could wish. If a regular system was formed between General Howe and the friends of our Constitution, his motions could not have been better

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<sup>1</sup> The date of his appointment is not known. The fact is known from numerous letters, especially in the collection of C. P. Humrich, Esq., of Carlisle. In the Dreer Collection, at the Pennsylvania Historical Society, among letters of the members of the Continental Congress, is a letter of Colonel Smith to Comptroller-General Nicholson, of Pennsylvania, from Carlisle, on August 9, 1783, regarding Colonel Smith's payment on a certain quantity of guns for the militia of Bedford county. The part of especial pertinence is as follows: "Some Time after I returned from the Camp in Jersey in March, 1777, I received an additional List of Guns which had been appraised before we went out; but the appraisement not having been sent down in proper time, I did not receive the Money till some time after that for the rest had been received." Apparently he was in the Quartermaster service during the most of the Revolution.

<sup>2</sup> "The St. Clair Papers," Vol. I, p. 392.

timed for them than they have been in two different instances. When an opposition has been twice set on foot, and has twice proceeded so far as to become formidable, he has twice, by his marches toward Delaware, procured a cessation. The Assembly have twice taken advantage of it to promote *their own* purposes, though those in the opposition generously, and like true patriots, have suspended it, while the approach of the enemy were dreaded. The Assembly, just before their adjournment, and just after their laudable instance of conduct was exhibited, have branded themselves in a public address to the people, with carrying on their opposition in a manner improper under *any* government. They have agreed, however, at last, to take the sentiments of the people with regard to a convention."<sup>1</sup>

By autumn of 1777 the British were attempting to close in on Philadelphia. During the first half of September the Assembly could get no quorum. The British had gone around to Chesapeake Bay, and in their approach to Philadelphia had fought the battle of Brandywine. On the 14th James Wilson and George Clymer were superseded in Congress by Joseph Reed and others. On the 18th the Assembly adjourned to meet at Lancaster on the 25th, and the Congress also removed there, leaving the State House deserted as a capital for the first time since its erection, over forty years before. The times were dark, and but few of the ablest leaders escaped an outcry of some degree against them.

On the 19th General St. Clair, at Reading Furnace, wrote a letter to Colonel Smith at Bedford. "I received your kind letter of the 7th and should without hesitation have set off alone for Bedford, but that the General [Washington] requested I would stay a few Days with him, as that Time he thought would probably bring Matters to a decisive Issue. I could not refuse, tho' my Mind is in so disturbed a State that I can be of very little service, and an unfortunate move we made two days ago (by whose

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<sup>1</sup> "The St. Clair Papers," Vol. I, p. 417. This was a very curious plan, announced by the Assembly on June 17, by which at the next election each electoral division should choose a commissioner, who should visit each freeman of his district, collect his ballot, "put it into a box or bag," and the results be taken on November 10.—Journals of Assembly, Vol. I, p. 146.

Advice I know not) has lost us the opportunity, the General sought for, and will probably occasion the City of Philadelphia falling into the Enemies' hands without a Blow—it depends entirely on our coming up with them to-day and we are now in March for that Purpose, but they have got so much Ground of us that I doubt they will be over Schuylkill at the Swedes Ford before we can possibly overtake them, should that be the case I will set out to-morrow—in the meantime I have sent my servant up, perhaps Mrs. St. Clair may take some Assistance from him—Danny I have sent to Carlisle. Adieu. I have not words for the Sense I have of your Friendship nor are they necessary.”<sup>1</sup>

The results are well known. Philadelphia was captured. The Congress met at Lancaster on the 27th of September and adjourned to meet at York, or “York-Town,” as they called it, on the 30th. The State and Congressional capitals were moving toward Colonel Smith, and Carlisle and Bedford became important seats for the colonial supplies, as well as those of the State. The Congress at York were much occupied on “Articles of Confederation” for the defeated but not discouraged Americans. It was October 6 before the Assembly secured a quorum at Lancaster, and they adjourned on the 13th, the new Assembly to meet there on the 27th, if Philadelphia should still be in the enemy's hands. They did not, in fact, get a quorum before November 20. The Supreme Executive Council, however, were in session at Lancaster, and received a note written on the 31st of October, from the Bedford Prothonotary, Robert Galbraith, living at York, telling of his difficulties in getting started.

“I have been at Bedford and opened the courts without any opposition. The Sheriff held the election, and though but a small one, yet I hope it will answer a good purpose. Mr. Smith still refuses to deliver up the Records, as appears by the affidavits sent you by Mr. John Morris, Clerk of the Assembly. I've sent by Mr. Morris the Nomination of Bedford Justices of Persons for Clerk of the Peace, which I expect the Council will take note

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<sup>1</sup> The De Renne Papers. This letter is now published for the first time.

of, and send up the commission per first opportunity.  
\* \* \* Mr. Woods has taken the Oath of Allegiance, and wonders why himself and the other two Gentlemen recommended with him, are not Commissioned; he says he is now determined to support the Constitution, and most undoubtedly he can do a great deal of good or ill in this county at the present Time. If the Council thought proper to send for Mr. Smith, and dispose of him in some other way than confining him in Bedford, it might answer a better purpose, for I am apprehensive he might be rescued here, and I am of opinion if he were brought before the Council he would agree to deliver them up; but this I leave to the wisdom and prudence of the Council.

"The generality of the People in Bedford County," he continues, "are well disposed to the Constitution, and a little Time, I am persuaded, will put matters upon a good footing. \* \* \* With compliments to Mr. Bryan and the other Gentlemen of the Council."

On November 17 the Supreme Executive Council, President Wharton, Vice-President Bryan, and four members, curtly ordered "That the said Thomas Smith, Esq'r, be Arrested and Confined in the Goal of the said County of Bedford, according to Law."<sup>1</sup> Mr. Bryan made out the warrant at once, which states that Colonel Smith had "neglected to comply with the demand for the records" and that he should be kept locked up in jail, but only until the records were secured.<sup>2</sup>

Ten days later, November 27, Colonel Smith joined Colonel George Woods in a letter to President Wharton at Lancaster, describing the Indian aggressions about them. "The present situation of this County," the communication reads, "is so truly deplorable that we should be inexcusable if we delayed a moment in acquainting you with it, an Indian War is now raging around us in its utmost fury. Before you went down they had killed one man at Stony Creek, since that time they have killed five on the Mountain, over against the heads of Dunning's Creek, killed or taken three at the three springs, wounded one and kill'd some children by Frankstown, and had they

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<sup>1</sup> Colonial Records, Vol. XI, p. 373.

<sup>2</sup> Pennsylvania Archives, Vol. VI, p. 12.

not providentially been discovered in the Night, & a party went out and fired on them, they would, in all probability, have destroyed a great part of that settlement in a few hours. A small party went out into Morrison's Cove scouting, and unfortunately divided, the Indians discovered one division and out of eight killed seven & wounded the other. In short, a day hardly passes without our hearing of some new murder, and if the people continue only a week longer to fly as they have done for a week Past, Cumberland County will be a frontier. From Morrison's, Croyl's & Friends' Coves, Dunning's Creek, & one half of the Glades they are fled or forted, and for all the defence that can be made here the Indians may do almost what they Please. We keep out ranging Partics, in which we go out by turns; but all that we can do that way is but weak and ineffectual for our defence, because one-half of the People are fled, those that remain are too busily employed in putting their families and the little of their effects that they can save and take into some place of safety, so that the whole burden falls upon a few of the Frontier Inhabitants. For those who are at a distance from danger have not as yet offered us any assistance, we are far from blaming the officers of the Militia because they have not ordered them out, for if they had they really can be of little or no service, not only for the foregoing reasons, but also for these, not one Man in ten of them is armed, if they were armed you are sensible [that], and take the country through, there is not one fourth Man that is fit to go against Indians, and it might often happen that in a whole class there might not be a single Person who is acquainted with the Indians ways or the woods, and if there should be a few good Men, and the rest unfit for that service, those who are fit to take the Indians in their own way could not act with the same resolution and spirit as if they were sure of being properly supported by men like themselves. The consequence would be that the Indians, after gaining an advantage over them, would become much more daring and fearless, and drive all before them. A small number of select Men would be of more real service to guard the frontiers than six times that number of People unused to arms or the woods. It is not for us to dictate what steps ought to be taken, but some steps ought



to be taken without the loss of an hour. The safety of your county, your families, of your Property, will, we are convinced, urge you to do everything in your Power to put the Frontiers in some state of defence. Suppose there were orders given to raise about 100 Rangers, under the Command of spirited officers, who were well acquainted with the woods and the Indians and could take them in their own way. They could be raised instantly, and we are informed there are a great number of Rifles lying in Carlisle, useless, altho' all the back Country is suffering for the want of arms. It was a fatal step that was taken last winter in leaving so many guns when the Militia came from Camp, about this place especially, and all the country near it, they are remarkably distressed for the want of Guns, for when the Men were raised for the army you know how we procured every Gun that we could for their use, the country reflect hard on us now for our assiduity on those occasions, as it now deprives them of the means of defence. But this is not the only instance in which we bear reflections which are not deserved. The safety of our country then loudly called on us to send all the arms to the Camp that could be procured, and it now as loudly calls on us to entreat that we may be allowed some as soon as possible. As also some ammunition, as that which was intrusted to our care is now almost delivered out to the officers who are fortifying, and what remains of it is not fit for rifles. We need not repeat our entreaties that whatever is done may be done as soon as possible, as a days delay may be the destruction of hundreds."<sup>1</sup> In December money and arms were voted by the Supreme Executive Council at Lancaster for the use of the frontier militia.

Meanwhile Mr. Galbraith was a little slow about arresting Colonel Smith, for it was the 6th of February, 1778, before he reports his success. "These will serve to inform your Excellency," he says, "that upon my going to Bedford, I put the Warrant I obtained from the Council into the Hands of the Sheriff, who took Mr. Smith into Custody, upon which he delivered up the Records, Seals, &c. Notwithstanding the Indian disturbances in the County, we had a pretty smart Court. The Grand Jury

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<sup>1</sup> Pennsylvania Archives, Vol. VI, p. 39.



found several bills, and a great many who were for some time past backward in taking the Oath came into Court and took it, so that I have the pleasure to inform you matters wear a good aspect now in Bedford, with regard to the Constitution.”<sup>1</sup>

Three months later the Council received a letter from Lieutenant Hugh Davidson, asking to be relieved from the post of Sub-Lieutenant, as conditions in Bedford made his efforts useless. “I cannot but suggest that our Board has been too weak to have influence among the People in the peculiar Circumstances of the County, this may be owing to the appointment of some Persons to it who were utterly unacquainted with Public Business, little known in the County, and not of sufficient public Reputation & Influence to stand against that Resentment of the People raised even by the due Exercise of their office, (for I apprehend that officers ought to have personal influence as well as legal Power or else Government will be weak)—I am prone to think that one occasion of this may have arisen from hence, that the Gentlemen in & near Bedford, who are confessedly best acquainted with public Business & capable of managing the affairs of the County, have on account of their former opposition to the Constitution of the State, and perhaps on account of some wrong Representations concerning them, been kept out of Places of Trust, even when our situation required all the assistance they could give. I think it not strange that it should be so, as I understand they have been represented as unfriendly to the cause of Liberty & Enemies to the State. But as I am fully persuaded that such representations are false & malicious, & that however they did at first oppose the Constitution, & still may desire amendments made to it, in a proper way, they are, not only from the urgent necessity of our circumstances, but from Inclination, disposed to avoid any opposition & support and carry on the legal authority in the County, I would therefore pray that for the good of the County, the strengthening of Government in it, and the sake of Harmony in this Part of the Commonwealth, it may please you to disallow of any Representations or objections against their acting in any Places

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<sup>1</sup> Pennsylvania Archives, Vol. VI, p. 238.

to which they may be thought fit to be appointed, resting assured that such Representations are not only a great injury to them, but to the County, which at this time, so much needs their help.”<sup>1</sup>

Meanwhile a guerrilla warfare was constantly kept up in the western mountains by Indians and British sympathizers. “I have reason to believe,” wrote Colonel John Piper of the First Battalion, writing on the same date, “that not less than one third the men in our County are actually fled, and the rest who remain are Constantly on their Watch Tower, and in daily expectation of an attack from indians or torys, who seems at Present verey numeras and dayly Encreasing.”<sup>2</sup>

On the following day, May 16, Prothonotary Galbraith, in contrast, sends to President Wharton, at Lancaster, a more roseate account. “The Courts at Bedford, Carlisle and York, are held with great regularity and propriety, and more business done in the sessions in a week than used formerly to be done under the old Constitution.” President Wharton no doubt saw how a Constitution could effect the amount of business done in a week in a local court. “It is with pleasure,” he continues in the same hopeful strain, “that I acquaint you that a reconciliation is effected in Bedford County, between the Inhabitants, who for some time past were opposed to each other with regard to the Constitution and political sentiments. The matter originated between Mr. Smith and myself, and our endeavors with each Party had the desired effect. Mr. Woods, Mr. Smith & Mr. Espy, all applied at the Court for admission as attornies, and were by the Court admitted accordingly; previous to which they had taken the oath of allegiance, and gave assurance of their sincere intentions of burying all past disputes in oblivion, and their hearty and sincere endeavors to assist government and its Laws and Officers to the utmost of their power. The Bench and Bar, as usual, Dined together two days of the

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<sup>1</sup> Pennsylvania Archives, Vol. VI, p. 504. The letter is dated May 15, 1778. It is interesting to note that this same day the Congress released John Penn and Benj. Chew from parole and allowed them to return to Pennsylvania, and that Dr. John Conolly was in prison at this time.

<sup>2</sup> Ibid., p. 506.

Court Week, and transacted business with great unanimity. I had several reasons for joining with them, (for I would inform, the application came from Mr. Smith to me) first, because a returning penitent ought to be admitted, and because they had it in their power to do a great deal of good or harm; they were old settlers, acquainted with business, still had the confidence of a number capable of giving uneasiness and trouble, notwithstanding we had brought them under the Law; 'That forced prayers are not good,' is an old maxim, and 'convince a Man against his will and he'll be of the same opinion still,' is another I well remember. The application coming from them, has every mark of sincerity; their getting admitted and bearing allegiance voluntarily, &c., is in my opinion, not only a sufficient acknowledgment to Bedford County, but the State in general. That by their assistance and advice their mouths are stopped from finding fault, the present officers eased of a great deal of the Burthen of publick business, & the Council be no more troubled with long Epistles, &c. For had not this been effected at last Court, there would've been a number of Replevins and other actions commenced against the present officers (that whether well or ill founded) would've done more harm than good, and to avoid this they say they want nothing but friendship, and that Justice may be done them. As I look upon myself bound to do everything in my power for the good of the Cause in general, and Bedford County in particular, I would, at the request of Mr. Smith, (for I believe he is almost tired of writing to Council himself) mention the situation of some Townships in Bedford County with regard to Magistrates. George Woods, Sam<sup>l</sup> Davidson & George Funk, were elected for Bedford Town, and returned some time ago. Whether it would be proper to Commission Mr. Woods or not, as he is admitted an attorney at Law, I leave to the Council to determine; Mr. Davidson has been in the Commission before, and made a good Magistrate; George Funk is an honest Man, and may please the Germans; William Proctor, Junior, was in Commission before, and made a good Magistrate; Wm. Tod came to Bedford County to live shortly before I removed to York County, and therefore cannot say much of him from my own knowledge, but as he has been elected

with Mr. Proctor for Bedford Township, may do very well.”<sup>1</sup>

The condition in the West was so serious during all the spring of 1778 that when the Assembly adjourned, on April 2, after telling the Congress at York that the United States ought to bear the burden of protecting the frontier counties, and did not get a quorum again before May 18, Colonel Smith wrote to the War Office an account of the situation. He recommended the organization of a body of at least 250 riflemen under one of the Butlers, who were practiced Indian fighters. The letter was submitted to General Washington by Adjutant-General Pickering on May 19, with earnest recommendations which showed the fullest confidence in and respect for Colonel Smith’s judgment.

General Washington, who had spent the winter at Valley Forge, was initiating his spring campaign. It became evident that the enemy were to leave Philadelphia. Meanwhile, on the morning of May 23, President Wharton died at the capital, Lancaster, and Mr. Bryan became the head of the government. Early on the morning of June 18, the British left Philadelphia, and Acting-President Bryan took measures by which the government of Pennsylvania was again established at Philadelphia on June 26. The Congress at York, which had submitted the Articles of Confederation to the State, got back to the State House, in its old quarters, on July 2, and began work on the 7th with the Articles ratified by a large number of the States.

While the summer of 1778, with the successes of Washington in New Jersey and the friendship of France, was passing, two events were happening of interest to Pennsylvania’s future. One of these was the publicity given to General Joseph Reed’s reply to a British attempt to bribe him; that he “was not worth purchasing, but such as he was, the King of Great Britain was not great enough to do it”—a reply which gave him a new popularity in Pennsylvania.<sup>2</sup> The other event was a species of landslide in the general elections of that State, as a result of the new purposes of the anti-Constitutionalists to vote more freely and support the government, since the radical party had

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<sup>1</sup> Pennsylvania Archives, Vol. VI, p. 511.

<sup>2</sup> Journals of Congress, Vol. IV, p. 329, and General Reed’s own account in the *Pennsylvania Gazette* of February 24, 1779.

already consented to a means of taking the public sentiment regarding a new convention. The result was that a new Assembly was elected of a very different political complexion from the former one.

On October 26, members of the new Assembly met, but there was no quorum until November 5. They found the old chamber rather small, and adjourned to the college on Fourth street, until changes could be made. Before organization a day was spent in debate as to taking the oath prescribed by the Constitution, many fearing that it would prevent their freedom in working for a new convention. It was finally agreed, on the 6th, however, that the oath should be taken and such as desired might annex the following "reservation or explanation": "The subscriber hereby expressly reserving to himself full liberty to adopt and pursue such measures as he may judge necessary for collecting the sentiments of the people, on the subject of calling a new convention, to revise, alter, amend or confirm the said Constitution—and reserving also, full liberty of co-operating, as well with his fellow-citizens, in calling the said convention, as with the said convention, if called." With this modification of the oath the chief sting of the Constitution of '76 was removed. This oath it was which produced more virulence in the opposition to that Constitution than the faults of the instrument itself, for numbers would not take it in order to vote, and this, together with the fact that many voters were scattered in the army, made the real vote under that instrument, heretofore, seem a hollow mockery. The previous Assembly, however, by assenting to a measure for sounding sentiment for a convention, had, in that act, virtually interpreted the oath in this manner.

When the returns were opened fifty-nine uncontested names appeared, and of these forty-one appeared and took the oath. Nineteen, or nearly half of those who appeared on the 6th, took the qualified oath. These were Robert Morris, Thomas Mifflin, Samuel Meredith and George Clymer of Philadelphia, all except one, with General Joseph Reed absent; two from Philadelphia county; James Dunlap, Stephen Duncan and John Allison of Cumberland county; Jonathan Potts, Edward Biddle and Mark Bird of Berks; one from Northampton, and the solid delegation from Bedford—the only county which was solidly anti-Constitution-



alist—namely, Henry Rhoads, Bernard Dougherty, Thomas Smith, George Woods, Hugh Davidson and John Burd. This placed Philadelphia and Bedford as leaders of the anti-Constitutionalists, with especially strong men in both delegations. Of course the Constitutionalists organized the Assembly and elected their old Speaker, John Bayard, of Philadelphia county, but the minority was so large that it had to be considered. They gained but four more by the close of the month, so that they continued to be a minority, as the others gained even more.

Before proceeding farther, note may be made of a closing incident in Bedford affairs. On the 25th of November, Prothonotary Robert Galbraith took pains to notify both Vice-President Bryan and the Council and also the Assembly that he desired to resign his office in favor of David Espy. The Assembly promptly recommended Mr. Espy, but on the 27th the Council curtly reminded Mr. Galbraith that he could not resign *in favor of any person whatever*; they appointed Mr. Espy, however, and the incident closed.<sup>1</sup>

Returning to the Assembly—Mr. Smith was placed on a modest committee for the first time on November 7—a committee to consider a complaint from Berks county about so great use of grain by distilleries. Seven days later he was put on another, for continuing a certain act regulating public transportation. On the 23d the House had its first division on the admission of the Chester county contestants, on the question as to whether those taking the oath after June 1 were entitled to vote, and the Constitutionalists won by 27 to 21. Five days later a committee of twelve, headed by Robert Morris, was appointed to bring in resolves relative to taking the sense of the people on the subject of calling a new convention. The minority had the chairman and three other members, one of these being Thomas Smith.

This committee reported on the 27th of November—three weeks after the organization of the Assembly—in favor of an election on the first Tuesday in April, 1779, and the meeting of such convention at Lancaster on June 1 following. This body was to consider and decide nine separate points: "1. Whether the legislative power of the

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<sup>1</sup> Pennsylvania Archives, Vol. VII, p. 99.



State shall be vested, as at present, in a single branch? 2. If the convention should be for a second branch of legislation, then, how the same and the executive powers for the administration of government shall be constructed? 3. If the convention shall determine against a second branch of legislation, whether any provision shall be made for the revival of laws (without any negative) before they receive their final sanction? 4. Whether the appointment of justices and field-officers of the militia shall be vested in the executive powers of government? 5. Whether the Council of Censors shall be abolished? 6. Whether the President and Vice-President may not be eligible into Council, so as to be capable of said offices, after the expiration of three years, if their conduct shall render them worthy? 7. Whether the Judges should not be made more independent by having their salaries fixed and certain? 8. Whether agreeable to the articles of confederation of the United States, the delegates in Congress may not be eligible three years successively? 9. In case any alterations shall be made by the convention in the above points, how the several oaths prescribed by the Constitution shall be adapted thereto?"<sup>1</sup>

This action seemed to clear the political atmosphere in the Assembly somewhat. On November 30 Mr. Smith, Mr. Woods and Mr. Smiley were made a committee to confer with the Pennsylvania delegates in Congress on affairs in Westmoreland county. On December 1 General Joseph Reed, having resigned from the Assembly, which he never attended, and having been elected to the Council, was elected the second President of the State, with George Bryan again as Vice-President.

After the December and January recess of the Assembly, which met again on February 1, 1779, there were protests against their action in providing for a new convention. It was urged that it was unconstitutional and that a few years later it could be done as provided in the Constitution itself. "Many of our fellow-members," said a Chester county citizen in the *Gazette* of February 3, "have sworn to maintain the State *as now constituted*, and so are excluded from joining in measures to alter it, until the end of seven years, two of which have already elapsed; it is

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<sup>1</sup> Journals of Assembly, Vol. I, p. 247.

therefore unjust for the other members to attempt anything now, till all are equally free to seek a convention, or not, as they shall then judge best." A caustic writer in the *Pennsylvania Journal* of the 17th attacks President Reed for apparently joining the Constitutionals. "When you was appointed Chief Justice," he writes, "you refused to act, because you could not, *in conscience*, take the oath. \* \* \* How do you reconcile the part you have *since* taken, in support of the present government, and the appointment of President, which you have accepted, with your former professions? \* \* \* But what can we think of a man of your address and abilities, connecting himself with a set of men, many of whom are men of desperate fortunes. Do you know more violent opposers of the Constitution than the present Speaker<sup>1</sup> and Chief Justice<sup>2</sup> were a few months ago?—I suppose you are in the secret! Tell us, what was the reward of their treachery?" Between these two classes of irreconcilables there were those who were seeking to take a wise course that would, if possible, make the question less of an obstruction to the greater conflict in progress, and unite the various elements of the State to make the best of what they had, while vigorously working for a Constitution in keeping with the best thought of the time.

This session of the Assembly was a very busy one, and Colonel Smith was one of the most busy of its members. As a rule the party cleavage remained the same, and the anti-Constitutionalists, led by Philadelphia and Bedford, knowing themselves in the minority, took occasion, on important questions, to have their reasons for dissent spread on the minutes. On the 4th of February Colonel Smith was made one of a committee of four to report on increasing the rates of excise, and on the next day was one of three to bring in a bill for that purpose. On this day, also, President Reed sent in the Council's message recommending, among other things, a Court of Errors, and a bill abolishing slavery, which had been urged before; "we feel ourselves so interested on this point," says the message, "as to go beyond what may be deemed by some the

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<sup>1</sup> John Bayard.

<sup>2</sup> Thomas McKean.

proper line of our duty, and acquaint you that we have reduced this plan to the form of a law, which, if acceptable, we shall in a few days communicate to you.”<sup>1</sup> This act was the work of Vice-President Bryan, and ultimately became a law, but the sensitive Assembly resented the assumption of the Council and at once appointed a committee to draw up a law of their own. On the 8th Colonel Smith was made chairman of a committee of five to draft instructions to the Pennsylvania delegates in the Congress across the hall, as to what was needed on the frontier. The following day he was made one of a committee of three to bring in a bill for the sale of forfeited estates, and a similar committee on fines and penalties for the neglect of duty in public offices, as well as one of like number to confer with Virginia delegates on the boundary question. The desire of Bedford to sell her old first court house was also referred to a committee of three, of which he was a member, on the 11th of February.

On the 13th the struggle over the Council's submission of an abolition law came up, and the Constitutionalists, by a vote of 27 to 22, voted that they would originate all bills themselves, refusing the minority amendment that the House committee would “no doubt receive any assistance which may be offered them.” On the 16th he was made one of a committee of nine to confer with a Congressional committee on the defense of the frontier, and was unanimously made chairman of the Committee of the Whole on the question of monopolies or “forestalling.” On the 17th Edward Biddle, Colonel Smith and Colonel Hartley, all anti-Constitutionalists, were made a committee to bring in a bill creating a High Court of Errors and Appeals, and on the following day he was made one of a committee to prevent the distillation of grain. The currency had depreciated so much that it was causing trouble in all directions, so that a committee of five was appointed to consider its effects on supplies for the army and confer with a committee of Congress. To this, also, he was assigned.

February 24 witnessed another contest over the question whether holding an office under Congress disquali-

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<sup>1</sup> Journals of Assembly, Vol. I, p. 307.

fied from membership in the Assembly. The anti-Constitutional party said not, and insisted that such a resolution was "contrary to the Constitution (which, however repugnant it may be in this and in other instances, to the true principles of liberty, and the happiness of the good people of the State, it is our indispensable duty to keep unimpaired, until altered by those who alone have the right to do so, the people)"—all of which sounds very much like Smith's delicious irony in his letters to St. Clair. Of course, they were overruled, by a vote of 37 to 21. The same day an attack was made on Chief Justice McKean, although his name was not mentioned, when a vote was taken as to whether the Constitution allowed a member of the Supreme Court to represent another State in Congress. The Bedford and Philadelphia people could muster a vote of only 12 in favor of the constitutionality of this condition.

On the afternoon of the 27th came the real fight of the session. Petitions in great numbers had begun to come in protesting against the action of the Assembly in calling a new convention. A vote was taken as to whether the action should be rescinded or not, and it stood 47 to 7 in favor of repealing the order. These seven gave their reasons for dissent and signed their names in the following order: Robert Morris, George Clymer, Thomas Mifflin, Samuel Meredith, George Woods, Bernard Dougherty and Thomas Smith—all of either Philadelphia or Bedford. Their objections were carefully and strongly put, the chief points being that there was danger of this Constitution becoming fixed on posterity; that the single-branch Legislature gave no guarantee of political liberty; that the executive power was so weakly arranged that it had no vigor, a situation which compelled arbitrary and unlawful usurpation of power at times, a dangerous precedent; that the Council of Censors was a dangerous instrument in the hands of designing men; that the provision by which Justices and militia officers were to be elected by the people was faction-producing and dangerous; that the law of rotation in office with limited service took away incentive; that the Judiciary were in too dependent a state; that the legislative, judicial and executive powers are virtually placed in a single body, making it capable of despotism; that the remonstrances, which

numbered only slightly above 10,000, showed that they believed a majority of the people would favor a convention; that there was reason to believe many of the signatures were secured by misrepresentation; that there was no unity in the petitions, differing so much that some did not desire rescinding of the resolution unless the majority of the State did, and that no measures had been taken to investigate the petitions.

This action was followed by great public excitement all spring, summer and autumn of 1779, ending only in the Third street tragedy in October. Violent controversies arose in the press, of which President Reed seemed to be most frequently the object. The depreciation of the currency and consequent rise in prices had much to do with the disaffection, as well as the drastic measures against all suspected persons. The root of the whole matter, however, was the fight over the Constitution, which now led to organized parties or "societies."

Because at this time, early in March, 1779, Colonel Smith's brother (as he always called his half-brother), Dr. William Smith, became involved in a controversy in the press with President Reed,<sup>1</sup> and the College of Philadelphia became an object of attack by the radical party, it may be of interest to turn aside from the Assembly and notice a phase of Colonel Smith's life of which there has heretofore been no intimation. Dr. Smith, like even Washington himself, not to mention many others, had, even with all his encouragement of resistance, hoped that reconciliation between the colonies and Britain could be effected, but when the radical element came into power, he was set aside and was even among the number paroled when the British were about to take Philadelphia. He had a beautiful country seat at the Falls of Schuylkill, where Colonel Smith had been wont to visit him, when in the city, but during the British occupation Dr. Smith withdrew to his plantation farther up the Schuylkill, on an island, near Valley Forge and General Washington's army. After the evacuation he returned to his home at the Falls. Here Colonel Smith often visited him and, during this period and the next two years, his acquaintance with Miss

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<sup>1</sup> The *Pennsylvania Gazette*, March 3, 1779.

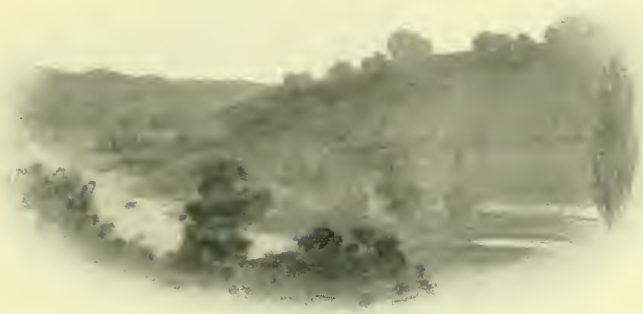


Letitia Van Deren, daughter of John Van Deren of Wissahickon, was steadily acquiring a more than ordinary interest to him. He had been very active in public life now for nearly a decade, and had reached the age of thirty-four, when, it would seem, the time must soon come, if likely to come at all, when love, as well as politics and war, might be added to his various interests.

The month of March, 1779, however, was very fully occupied with politics, war and statesmanship. On March 1 Colonel Smith was one of a committee of twelve to effect a census of taxables to carry out the provision of Section 17 of the Constitution for this year, and on the following day was one of a similar number to take up the claims of the late proprietaries. On the 4th he became chairman of a committee of five to digest a plan of compelling all persons entrusted with public moneys to account for them promptly. The case of the sloop *Active* came up on the 8th, and he was one of five to confer with a Congressional committee on the admiralty proceedings in regard to it. On the next day the Supplies bill for 1779 came up, and on a vote as to whether moneys should be raised by city and county quotas, there was the first break in party lines in which yeas and nays are recorded. Colonel Smith voted in the negative or losing side, but on the next day, on the vote as to taxing ready money, his side won the negative—the anti-Constitutionalists being aided by a few from the other side. The committee on the admiralty case asked for instructions the same day, and a Congressional conference was asked, with the statement that there was no conflict, necessarily.

At this time Colonel Smith received a letter from General St. Clair telling him of the dangers of revolt in the Pennsylvania line of the army because of lack of provisions for them. This was not confined to the Pennsylvania line, but was quite general, and was due to depreciated currency, in large measure. It was no doubt involved, too, by the Constitutional fight at home, although General St. Clair was not aware of it; for in a letter to President Reed he said: "If any attempts have been made to engage the gentlemen of the army in the parties that unhappily distract our State, it is altogether unknown to me, nor will it ever meet with my countenance; and although I have





COUNTRY SEAT OF PROVOST DR. SMITH AT SCHUYLKILL FALLS,  
from a view with the portrait by Stuart, in possession  
of Dr. John H. Brinton, Philadelphia



always been, from principle, opposed to our present Constitution, of which I have never made a secret (and in private life would have joined in any measures that promised to bring about an amendment), yet, whenever it appears to be the choice of the majority of my fellow-citizens, I shall consider it as my duty to acquiesce. My opposition never arose from a dislike to men, but because I thought it contained principles unfavorable to liberty, and must inevitably sooner or later end in a tyranny of the worst kind.”<sup>1</sup>

Colonel Smith at once, on March 11, moved for relief, and he was made one of a committee of seven to bring in a bill, which was done two days later, and generous provision made. A few days later he wrote St. Clair: “I hope my friend will join with me in expressing his approbation of our resolves with regard to the army. Immediately on the receipt of your letter, I made the motion on which they were founded. \* \* \* The same committee that brought them in, brought in some others yesterday, as well for the benefit of the recruiting service, as to extend the operations of our first resolves more generally.” Later in the year these resolves were put into statute form, and, says William Henry Smith, “It was through the efforts of Mr. Reed and Judge Thomas Smith, the very handsome provision made by Pennsylvania (which a year later was dwelt upon by Washington as a model for other States) was secured.”<sup>3</sup>

On March 19 Colonel Smith was made chairman of a committee of five to revise an act to incorporate the Scotch-Presbyterian Church of Philadelphia, and the next day one of nine to digest a plan for relief from “monopolizers” of necessities. This was one of the greatest questions before the people, and was one of the phases of the depreciation of the currency. On the 24th the Council asked for a conference on certain relations of the State to Congress, and he and Mr. Chambers were sent to arrange it. On the same day also he was made one of a committee of five to consider a resolution of Congress for ascertaining the quota of troops for each State.

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<sup>1</sup> “The St. Clair Papers,” Vol. I, p. 466.

<sup>2</sup> *Ibid.*, p. 465.

<sup>3</sup> *Ibid.*, p. 480.

Meanwhile, outside of the Assembly, the political situation, as has been indicated, was becoming more and more tense. There had been a "Whig Society" for some time, organized by the Constitutionalists, and on March 24 the *Gazette* published the announcement of the "Republican Society"—a most able paper, which was attributed by the Constitutionalists to Hon. James Wilson. "While we oppose tyranny from a foreign power," it read, "we should think ourselves lost to every sense of duty and of shame, were we tamely to acquiesce in a system of government, which, in our opinion will introduce the same monster, so destructive of humanity, among ourselves. Such a system we conceive the Constitution framed by the late convention to be. We mean not that, in all its parts, it is repugnant to the principles of liberty: Though, while some articles remain, we are convinced, upon the most impartial examination, that its general tendency and operation will be to join the qualities of the different extremes of bad government. It will produce general weakness, inactivity and confusion; intermixed with sudden and violent fits of despotism, injustice and cruelty. Cannot a discrimination be made between its salutary and its pernicious properties? We have the instruction of ancient and modern times for our guide: We have the conduct of the other States in the Union for our example. The wisdom and patriotism of Pennsylvania is not inferior to the wisdom and patriotism of other commonwealths." This and the supplementary address covered two pages of the *Gazette*. Those who opposed the Constitution were called upon to make their endeavors even more earnest since the rescinding of the call for a new convention. It was signed by eighty-two members from all parts of the State, men like Meredith, Cadwalader, Clymer, Wilson, Ross, Edward Biddle, Thomas Smith, Benjamin and Jacob Rush, Robert Morris, Mifflin, Francis Hopkinson, Miles and Blaine.

This was replied to on the 31st by one of the leading Constitutionalists, Timothy Matlack, Secretary of the Council, who treated Wilson as the author of it, and warned them that they were treading close to the dead line marked "Conspirators." His argument was almost wholly the fact that, as he said, Franklin had favored it, and as proof of this he dwelt lovingly on a new picture of Frank-



LE DOCTEUR FRANCKLIN COURONNE PAR LA LIBERTE,  
The scroll on the globe being the Constitution of 1776, to indicate  
that Franklin was its author  
Half-tone of engraving in possession of Albert Rosenthal





lin which he says Mr. Bache had just received from France, in which is drawn a scroll, inscribed with the words "Constitution of the Government of Pennsylvania."<sup>1</sup>

On April 28 the friends of the Constitution announced articles of association under the name of the "Constitutional Society," of which Charles Wilson Peale was chairman.<sup>2</sup> "As good and faithful citizens," reads the first article, "we will support, both as a natural and constitutional right, an equal and universal liberty of conscience, and any man or society of men in the exercise thereof. To God, and not to man, are all men accountable, and in doing this, we mean *to do as we would be done by*." The whole paper has this tone of fiery zeal that characterized the writings of George Bryan, and one cannot read it without feeling that, however one might believe they were depending too much on their own consciences as a guide, without quite allowing for the general public conscience or the ordinary precautions of governmental science, they believed they carried the flaming torch of righteousness. They were not the first zealots to whom a single principle or enthusiasm over-simplified life; and though they did a great and glorious work, full of mistakes as it was, they took too limited a view of what was before them. Take out of these articles those parts upholding the Constitution of 1776, and possibly that defending the election of "Magistrates," etc., by the people, and there remain only expressions of political morality to which not a member of the Republican Society but could have heartily subscribed. Their articles were in reality the Constitution itself. They upheld the single branch Legislature, without mentioning it or attacking the upper house principle. They made much of having been at the head of the government during the war, which, it was now beginning to be felt, was nearly won, but they neglected to speak of the anti-Constitution-

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<sup>1</sup> Richard Bache, son-in-law of Franklin, was the chairman of the Republican Society. The engraving was a French one, representing Liberty crowning a bust of Franklin, which, with a scroll representing the constitution of '76, was held by a figure representing Pennsylvania. Through the courtesy of Mr. Albert Rosenthal, of Philadelphia, a reduced reproduction of it in these pages is made possible.

<sup>2</sup> The *Pennsylvania Gazette*, April 28, 1779.

alists who were in the field, or the many who served in government with themselves, not to speak of the many, as great patriots as they, who, because they opposed radical measures, were set aside. With all said, however, no one can come close to the life of George Bryan and the best of his supporters and not feel their lofty purposes and honesty of intention. It was a politico-sociological problem working itself out.

Turning from politics outside to that inside the Assembly, and taking up proceedings where they were left on March 24, a Constitutional question came up on the very next day as to whether County Lieutenants and Sub-Lieutenants could sit in Assembly. It was carried by a vote of 30 to 21 in the affirmative, but Meredith, Smith, Clymer and eight others wrote out their dissent, insisting that these Lieutenants were appointed as civil officers by the Assembly, not elected, and would be voting on their own money accounts. If they were militia officers they should be elected, according to the Constitution. Colonel Smith and his associates were becoming strict constructionists. On the 27th, he and Mr. Chambers, out of a minority of eight, on a vote concerning an amendment to a replevin act, registered a protest against the legal inaccuracy of the act as leaving property insecure. On the same day he was made chairman of a committee of three on the regulation of ferriage in the State. The minority tried to defeat additional test oaths in a certain act on the 30th of March, but failed by a vote of 34 to 15; and the same day they were defeated in a vote on a legal clause giving extraordinary powers to Justices of the Peace. A call from Massachusetts for help in securing bread supplies was this same day referred to a committee of three, of which he was one.<sup>1</sup>

The Assembly, having made a good record in amount of work done, hastened to finish so as to adjourn April 5. On April 1, to Colonel Smith, chairman, and Mr. Clymer and Mr. Smiley, of Lancaster, was assigned the duty of drawing up instructions to the delegates chosen on March

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<sup>1</sup> In a letter to Jasper Yeates, dated Aug. 30, 1799, Mr. Smith refers to a certain act, saying: "I was the only person in the Assembly who spoke against the bill when first brought in." This is given as a mere glimpse of these days.

23 to settle the Virginia boundary question, namely, Vice-President Bryan, Rev. Dr. John Ewing and Mr. Rittenhouse. The main point of these instructions was that they should arrange the true boundary, or, if that was not possible, a temporary one. Pennsylvania proposed to cling to the boundary she knew to be right. On April 3 there was a party vote on the question of wages of teamsters between North Mountain and Fort Pitt—the minority insisting on increased pay for that region and on increased wages for lieutenants of the city and counties, the minority opposing in the latter case. The last matter of special connection with Colonel Smith at this session was a message received the same day from Vice-President Bryan, who transmitted to the Assembly certain papers in a suit in Bedford county. “Of the merits of this transaction,” wrote Mr. Bryan, “the Council have nothing to communicate. Perhaps some of the gentlemen who represent Bedford county, can furnish some explanations; particularly Mr. Smith, who, as attorney, brought the suit. This is an instance in point of the abuse of replevins, in the case of public officers (whatever ground there was for an action); an abuse to which we hope you have put a stop by the law just passed.”

With the adjournment of Assembly on April 5, to meet August 30, came a long interval in which Colonel Smith returned to Bedford, where he soon became busily engaged again as Assistant Deputy Quartermaster-General in charge at Bedford, to supply the Western Department which had been organized under Colonel Daniel Brodhead, with headquarters at Pittsburg. The date of his appointment by Colonel John Davis as Deputy Quartermaster-General at Carlisle is unfortunately not known, but a letter to him dated September 3, 1778, as well as others following, both to and from him, show that he was acting at that time, and had evidently been before serving in that capacity for a long time. This letter is an objection to a bill presented to him for ferriage of the Eighth Pennsylvania Regiment over the Juniata, and request for instructions.<sup>1</sup> On the 21st Colonel Davis sends him \$6,000 for current expenses, and addresses him as “A. D. Q. M. G.”

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<sup>1</sup> From the collection of C. P. Humrich, Esq., at Carlisle, Pa.

These letters indicate that Colonel Smith represented the Quartermaster's Department west of Cumberland county. In a letter of the 24th he speaks of one of his forage purchasers, Major Coulter, as having in a few days "saved the Continent at least 500 Dollars."

Even while he was in the Assembly at the State House he carried on these operations through a deputy, and a letter of March 13, 1779, from Philadelphia, to Colonel Davis at Carlisle, will serve to show the nature of his duties, as well as throw some light on the situation: "I was favored with yours by Mr. Scull and should have been glad if he could have sooner returned. I have requested Col. Pettit to dispatch him as soon as possible and I know his delay is not owing to him, but because the Treasury was quite empty when he came down. I at the same time received a letter from Mr. Clinton with 3,896 Dollars of the impassable Emissions, and informed me that by reason of the resolve of Congress for calling in the same he was greatly distressed for want of Money and requested me to send him up Money to replace that sum immediately, and also 6,000 Dollars more; as there was but a trifle of the Public Money in my Hands I did not think it would answer any end to write to you till you received some Money. I would therefore request you to send up the Quantity he wants as soon as possible either to him, or to Bedford to be sent from thence to him. I think Coulter will have as much as he can get grain to purchase, and then he will decline acting, at least till after Harvest. Whether Funk has laid out all the money in his hands I cannot tell; but if he should want any he can get it to Borrow till I come up. I was sure when I saw you that what I then received would have been sufficient to purchase all the Forage that could be bought; but the high price to which it has risen obliged me to make up the rest of the 11,000 Dollars which I received of Col. Blaine in whose favor I have drawn an order on you for that amount—and I imagine that when I come up I shall want a small sum over and above what I now request you to send up to Clinton—because it seems to be the intention at present to carry on a vigorous Campaign to the Westward and Forage must be had; but I am sure I don't know where horses will be found.

"I delivered the 3,896 Dollars," he continues, "to Col.

Petit but as I could not take the necessary affidavit, as it had been out of my Possession, he could not replace it, but gave me a receipt that he would credit your account by that amount."

Three days after the close of Assembly he was at Carlisle, and on the 19th of April writes from Bedford, urging supplies on to Fort Pitt, saying "much depends on their *safe* and speedy arrival there."<sup>1</sup> On the 24th he tells Carlisle headquarters of scarcity of forage over the whole region and urges each brigade to bring some forage along, until after harvest. A letter of the 15th tells of forwarding a packet of General Washington to Colonel Brodhead, and particulars about forage for Kennedy's brigade.<sup>2</sup> On May 17, Colonel Brodhead writes him, as "D. Q. M. G.," telling him news of Indian warfare in New York, and adding: "The troops here are in great distress for want of provisions, and I am unable to strike a single stroke until a supply arrives. I am informed that a considerable quantity is arrived at Bedford and must intreat you if possible to send it on immediately."<sup>3</sup> Later in the month, however, he mentions provisions as abundant for the future. On May 29th the Council votes Colonel Smith \$14,000 for the frontier service.<sup>4</sup>

During the next few months the increased alarm over the conflict with the Indians over the West led to reorganization of the militia and ranger service. The three battalions completed in Bedford were ready for officers in August, and on the 10th the Council commissioned him Colonel of the First Battalion.<sup>5</sup> The only light on the activities of this period is to be found in a letter Colonel Smith wrote to Council, on September 15, after his return to the Assembly at Philadelphia: "Col. Martin one of the sublieutenants of Bedford County, on his leaving Town lately, informing me that when the Indians made the late incursions into that County, he thought himself under an indispensable obligation to call out a few of the Militia and Station them in such places as to afford the utmost protec-

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<sup>1</sup> This letter is in the excellent collection of Simon Gratz, Esq., of Philadelphia.

<sup>2</sup> The collection of C. P. Humrich, Esq., Carlisle.

<sup>3</sup> Pennsylvania Archives, Vol. XII, Appendix, p. 112.

<sup>4</sup> Colonial Records, Vol. XII, p. 9.

<sup>5</sup> Ibid., p. 70.



tion to the few Inhabitants yet remaining in that almost desolated country, that such a small number could do by ranging along the Frontiers and meeting each other at Stated Time & places and communicate their discoveries to each other. That he was happy to find that this mode gave great encouragement to the People & he hoped they would be able to relieve them at the expiration of their Tour—but to his great mortification there was not a grain of Powder more than what was delivered to the present Scout which would soon be exhausted and if a supply was not soon afforded those who were willing to turn out in defence of their helpless neighbors would not have it in their power—the consequences would most certainly be an evacuation of the whole country—and intreating me to apply to the Council for a small quantity of that on which their preservation so much depends, not doubting but that Council would afford them every assistance in their Power as soon as they could get any Powder—which when he was in Town he believed they were scarce of.

“Altho’ I am convinced,” he continues, “that Council have done everything in their Power for our Protection this summer, yet it has been our misfortune not to have had a single Man either for our own defence or escorting Stores to Fort Pitt, except a few of our own tired out Militia, and a few men of Capt. Clugages Company, who don’t seem to be extended wide enough & only afford protection to one corner, altho’ Col. Martin & myself by differing in Political sentiments which but too often give rise to a lasting Personal enmity, are not upon such friendly terms as I could wish to be on with every Man, yet Justice to his conduct requires me to declare that if it had not been for his patriotic exertions and indefatigable application, there had not by this time been an Inhabitant in the whole county.”<sup>1</sup>

The Assembly had great difficulty in getting to work again, after the summer recess of 1779, so that it was September 9 before they secured a quorum. He was one of the committee of twelve to revise the last minutes and lay unfinished business before the Assembly, as he was also one of a similar committee to consider the census returns, and

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<sup>1</sup> Pennsylvania Archives, Vol. VII, p. 696. He adds in a post-script, “I have almost lost the use of my Hand, which I pray may be my Excuse for this scrawl.”



the one to define the boundary between Bedford, Cumberland and Northumberland counties. Congress, which was sitting across the hall all this time, had voted to raise \$45,000,000, and the Assembly's committee on a bill to raise their quota by taxation included him. On the 10th he became a member of a committee of three on levying and collecting taxes, and a like committee to act on the petition of the Sheriff of Philadelphia, on the 14th. On this latter day came up again the question of taxing by county quotas, and the western representatives, to the number of thirteen, opposed it, Colonel Smith being among them. On the 16th he was made one of a committee of twelve on regulation of trade, a subject which grew out of the currency depreciation and was now reaching an acute stage. The report of the Virginia boundary delegates was referred to a committee of twelve, of which he was a member. A supplement to the test laws created a division on the 22d, on a clause calculated to punish those who would not take the oath. He was one of a minority of fourteen, as he was on the next day when the bill vesting estates of the late proprietaries in the commonwealth was under consideration, the especial point being an order requiring "John Penn, esquire" to testify as to values of quit-rents and other matters. The same day he was one of a minority of twenty-one, on postponing legislation on limiting the making of spirits from grain to the next Legislature. On the 27th Mr. Lollar and Colonel Smith arranged a conference of the Assembly and Council, and after the conference was one of five to digest a plan to carry out its purposes to buy salt and flour for the fleet of the French allies. On the 28th a new clause of the test laws was voted upon, giving those in York, Lancaster, Berks and Northampton six weeks, when Cumberland was allowed two months. It was only carried by a majority of six, and he led a group of five in voicing the reasons for dissent, saying, among other things, "as the house still pertinaciously adhere to the determination of compelling those, who have given such test since the first day of June, 1778, to take another oath, or be excluded from the rank of citizens of that State to which they have already sworn allegiance; common justice required that such persons should have had a sufficient time allowed them to submit to the indignity thereby put upon them." Congress on the 30th of

September asked for a conference on the decision of the Court of Appeals in the case of the sloop *Active*, and Colonel Smith was made chairman of a committee of three to meet the Congressional committee.

The Assembly had but ten days of October before its work closed, and they were busy days. On the 2d a motion was made for a committee to confirm the estates and charter of the College of Philadelphia and make them conformable to the new government, but an amendment was offered that the opinion of the Judges of the Supreme Court be taken before appointing the committee. This was a legal way of proceeding, and the minority of eighteen fought for it through a good many forms; finally Mr. Clymer and Colonel Smith led a group of ten in voicing dissent. It was a blunt paper, showing that this was an instance of the vicious operation of the present Constitution. After showing that no evidence was given for the arbitrary course pursued, it continues, "*Fourthly*, Because the corporation has an undoubted right to the inestimable privilege of having matters of fact tried by a jury; and matters of law determined by the judges, under the sanction of their oath of office. It is utterly subversive of this privilege, and of the fundamental principles of freedom, to bring causes of this nature to receive a determination here. The great *Montesquieu* declares that 'there is no liberty if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator.' *Blackstone*, in his commentaries on the laws of *England*, says, that 'in this distinct and separate existence of the judicial power, consists one main preservative of the public liberty. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law.' Any union therefore of the judicial and legislative powers in this state is of the most terrifying nature, and must afford the good people of *Pennsylvania* this uncomfortable reflection, that every interest, and every right they possess, however religiously guarded by the law and the constitution, may be in the uncontrol-

lable and instant disposal of one single body of men, not bound to any certain measures of right, and liable as other men to be hurried on by the transient gusts of passion, or the storms of faction. And more especially, as there is no incompetency in the courts of law to the present object however important or considerable it may be. *Fifthly*, Because one of the motives, which it is presumed has led the majority of the house to this determination, and which was urged with so much vehemence at the bar of the house, *to wit*, the expediency and propriety of disfranchising certain trustees of the college, for no other reason but that they had been at times, in their private capacities, desirous of promoting alterations in our constitution of government, discovers an intolerant and vindictive spirit, and indicates hostility against all such, however unquestioned their zeal or their services in the great and common *American Cause*, as have dared to differ in sentiment, from those into whose hands the conduct of public affairs has chiefly fallen, in the local politics of *Pennsylvania*.”<sup>1</sup>

On the same day, when the Readjustment of Salaries bill was taken up—another result of depreciation of the currency, Colonel Smith was made chairman of a committee of three to make a list of salaries as they were in 1772. On the 4th there was so much excitement over the attack on James Wilson’s residence, on the southwest corner of Third and Walnut streets, that the Assembly adjourned and could not get a quorum the rest of that day, although an effort was made twice. “The Fort Wilson Riot,” as it is called, was the climax of the irritation caused by the depreciated currency, consequent high prices of food, the effort of a self-constituted committee to regu-

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<sup>1</sup> Among the College Trustees at this time were James Hamilton, Benjamin Chew, Edward Shippen, Jr., Thomas Willing, Dr. John Redman, John Lawrence, Thomas Mifflin, Rev. Dr. William White, James Tilghman, Robert Morris, Francis Hopkinson, Alexander Wilcocks, George Clymer, John Cadwalader and James Wilson, some of the strongest men under the old government, many of them strong supporters of the Revolution and leaders of the Republican Society, opposing the constitution of 1776. It is unnecessary to go into the history of the giving of the college over into a new University of Pennsylvania, the later restoration of the college, with the two institutions existing side by side, and their union in the present University in 1791, as Colonel Smith’s relations to this matter practically ceased at this point. His brother, Dr. Smith, being the Provost, would make his activity not wise or useful.

late prices and the refusal of Robert Morris and other large merchants to join them, and Wilson's defense of Morris and others before this, whom the mob of militia wrongly supposed to be the cause of it all. In July Mr. Morris had publicly explained his course and said he knew of no reason for this enmity except his opposition to the Constitution of '76; "my sole object," he wrote, "was to obtain such a Constitution as would in my opinion answer the ends of good government." Wilson's able defense of rights in court, however, had inflamed a certain part of the militia, and they started out to capture him. General Mifflin and other friends were with him, and when the mob broke in the Third street door several of them fell. President Reed, with some of the City Troop, dispersed them at this point, however. The event seemed to rather startle both sides and compel greater moderation in party rancor. Indeed, it seemed to be a turning point, from which it became evident that the Constitution of '76 and its supporters must be given the trial they claimed for it, and that more than anything else the public attention must be centered on the condition of the currency, which made it impossible to approach other questions without undue irritation. The Constitution of '76 was destined to a trial of a full decade more.

When the Assembly met on the morning of the 5th of October they sent a committee to assure President Reed of their support of his measures the day before and resumed business, chief of which was consideration of regulation of food prices. Messrs. Clymer, Smith and Harris were assigned to take up some petition along this line, and Colonel Smith became one of a committee of four to arrange with Council some method of showing honor to General Wayne and the troops of the Pennsylvania line. On the 9th he was made chairman of a committee to bring in amendments to the government security and militia laws, which were promptly acted upon, and on the 10th, after recommending certain unfinished laws to the next Assembly, and urging delegates in Congress to by all means use every endeavor to solve the problem of public finances and the currency, the Assembly, the last in which Colonel Smith was to serve, and one in which he had been one of the ablest and most useful members, came to a



JAMES WILSON  
Half-tone of miniature in possession of  
Thomas H. Montgomery, Esq.,  
West Chester, Pennsylvania





close with the Constitution of '76, more strongly entrenched than ever, but only for a time, until the excitements of the Revolution should abate and time should heal some of its wounds.<sup>1</sup>

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<sup>1</sup> Simon Gratz, Esq., of Philadelphia, has the manuscript order of the Speaker of the House on State Treasurer David Rittenhouse, for Colonel Smith's salary and mileage for 215 miles of travel, dated October 9, 1779, and calling for £422 10 shillings. Mr. Gratz also has a letter of Mr. Smith, dated July 19, 1790, which says, referring to the Bedford region in 1778-9-80: "I was in that part of the country during that period, & neither then, nor at any time before I received your letter, did I hear of a Fort of that name (Fort Loyal Whig)—perhaps it was baptized for this particular occasion."

## VIII

### MEMBER OF THE CONTINENTAL CONGRESS AND ACTIVE IN RESTORING NATIONAL FINANCES

1780

By an interesting coincidence, the close of the late Assembly on October 10, 1779, and Colonel Smith's service as a representative, occurred at almost the same time as the Constitutional limitation of Vice-President George Bryan's service as a Councillor.<sup>1</sup> The coincidence was highly significant. Busy as the late Assembly was, and much as it accomplished, it did not see its way clear to pass some of the measures which Mr. Bryan had most at heart, such as the Abolition of Slavery act and the one creating a High Court of Errors and Appeals. The Constitutionalists had found their majority in the late Assembly entirely too small for comfort, and the large opposition, while it did not prevent the control of Mr. Bryan's party, was sufficiently strong and threatening to make them take a very moderate course—for them. They determined upon a vigorous program for the next election on the second Tuesday in October, namely the 12th, and frequent meetings of the Constitutional Society were called to consider "business of consequence," as the advertisements in the *Gazette* described it. Their plan was nothing less than a vigorous campaign over the State, and the resignation of Mr. Bryan so he could stand for the Assembly and lead it in pushing through the various measures determined upon.

The old Assembly, as has been said, closed on October 10, and this was followed on the 11th by Vice-President

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<sup>1</sup> Section 19, Constitution of 1776, which provides, *inter alia*, that after serving three years as Councillor, four years must intervene before he can be elected again.

Bryan's resignation.<sup>1</sup> The election occurred the next day at the State House, and Mr. Bryan was returned as the leader of the representatives in the Assembly from the city of Philadelphia, with the chairman of the Constitutional Society, Charles Wilson Peale, among his followers. It was plain that the whole State had gone the same way, so that the opposition in the new Assembly would be but a bare handful and not especially strong. Bedford only sent two representatives, and neither one of them was Colonel Smith. No quorum could be secured before November 2, which was over a week beyond the appointed time. They again organized, with John Bayard as Speaker and the celebrated author of *The Crisis*, Thomas Paine, as Clerk.

It is not the purpose to enter into the operations of this Assembly, except so far as its action bears upon the career of Thomas Smith, who at this date was at his home in Bedford, where he was busier than ever as Assistant Deputy Quartermaster-General. The Constitutional Society's program was carried out in both letter and spirit, or, one might more accurately say Mr. Bryan's program, for if ever an Assembly was one man, certainly that of 1779-80 was that Assembly, and the one man was the late Vice-President. During the first session, namely, that between the organization on November 2 and the adjournment on the 27th, something over three weeks, there were thirty-nine committees appointed, covering all the important subjects which this Assembly proposed to push to passage. Of this number, the chairmanships of the astounding proportion of practically *four-fifths*, or thirty-two, were given to Mr. Bryan or Mr. Peale, and even then Mr. Peale only received five of the less important ones. It is doubtful if there is a more remarkable instance of one-man power in any Legislature in American history! With the chairmanship of twenty-seven out of thirty-nine committees, Mr. Bryan was the head of every important committee of this Assembly, and consequently in absolute control of it. The situation was also one of the best re-

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<sup>1</sup> Colonial Records, Vol. XII, p. 127: "I, George Bryan, who for upwards of two years last past have held and enjoyed the office of Vice-President of the Supreme Executive Council of the Commonwealth of Pennsylvania, do, on this eleventh day of October, in the year of our Lord one thousand seven hundred and seventy-nine, resign the said office. As witness my hand. George Bryan."

corded comments on the loyalty of his following and his acknowledged superiority over them. He was the revered leader of the common people and they gave him unquestioned sway. Among the most notable bills of this short session which came to passage was that vesting the estates of the late proprietaries in the commonwealth, and the forfeiting of the college charter and erection of a State university upon its ruins. It is perfectly natural that Colonel Smith should not want to be a member of an Assembly which proposed to destroy the life-work of his brother and remove him from headship of an institution which he practically created and over which he had presided for over a quarter of a century.<sup>1</sup> This was a part of the drastic program of Mr. Bryan and the Constitutionalists. The work was, of course, not all of this character; but these radical measures were the ones this Assembly was especially chosen to secure.

The second session, which began the 19th of January, 1780, and closed on March 25, saw the Philadelphia leader about as dominant as before. Of course, the comfortable majority of the Constitutionalists had by this time made a few cases of divisions among themselves in this session, and the already large burden resting upon Mr. Bryan, assigned at the last session and much of it still unfinished, led to a greater distribution of the less important assignments among other members. With all that, however, only twenty out of the fifty-two new committees appointed at this session were thus distributed, and by a striking coincidence Mr. Bryan and Mr. Peale received exactly the same number of new committees as at the last session, namely, twenty-seven for the former and five for Mr. Peale. These were all chairmanships, too, with but a single exception, in which Mr. Bryan was an ordinary member. The session was prolific for so short a one, especially when one man did so much of the work, for on the day of adjournment the seals were affixed to thirty-two important laws, some of them of the most far-reaching importance. One of these created the High Court of Errors and Appeals, which was afterward objected to because it

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<sup>1</sup>Dr. Smith promptly went over into Maryland and founded Washington College, at Chester, in 1782, after a courageous effort to get the College of Philadelphia restored.

was too largely dominated by the Supreme Court, which was a part of it, but this was in line with Mr. Bryan's principles of organization, however, one of which was the concentration of power. Indeed, the Philadelphia leader had now practically reorganized the whole State government, and had, so far, served in both the executive and legislative branches, where he determined many of their precedents. The only part in which he had not served was the judicial branch, and even that he had now recreated according to his own liking. Although he had been a merchant, he was an omnivorous student, and had read and practiced law, so that now, as a recognized leader and master of law-makers, it would not be strange if he should be thought fit for the judiciary, at least by his followers.

The act of which Mr. Bryan himself was most proud, however, and the work which, more than anything else he did, will longer entitle him to fame, was that for the abolition of slavery. He had recommended this even while he was Vice-President, over a year before, as an expression of gratitude for the deliverance from British tyranny and because it was a strange anomaly for a people struggling for freedom to hold another people in bondage. The Pennsylvania Society for the Abolition of Slavery had been organized at the opening of the Revolution, April 14, 1775, and the Friends had been active in agitation.<sup>1</sup> So when the act was passed, on the 29th of February, 1780, by a vote of thirty-four to twenty-one, Pennsylvania, through Mr. Bryan, "led the way," says Bancroft, "toward introducing freedom for all." "Our bill," wrote Bryan to Samuel Adams, of Massachusetts, "astonishes and pleases the Quakers. They looked for no such benevolent issue of our new government, exercised by Presbyterians."<sup>2</sup> The bill became a law on the 25th of March, when the Assembly closed, but just before adjournment Mr. Bryan had the unique honor of having his hard and valuable work recognized by an extra appropriation of £500 "for extra services, rendered by him during the recess and present sitting of the house."<sup>3</sup>

Mr. Bryan scarcely had time to clear up the business of the session before the *Gazette* announced that it was under-

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<sup>1</sup> The State then had about 6,000 slaves.

<sup>2</sup> Bancroft's "History of the United States," Vol. V, p. 413.

<sup>3</sup> Journals of Assembly, Vol. I, p. 454.

stood that he had been "*unanimously*" chosen by the Council as a member of the Supreme Court. This tribunal, heretofore the highest in the State, was composed of Chief Justice Thomas McKean and Justices William Augustus Atlee of Lancaster and John Evans of Chester, but, on April 3, nine days after the Assembly closed, "The Council taking into consideration the state of the Supreme Court, and being of opinion the interests of the State required another Judge, proceeded to choice, when the Hon'ble George Bryan, esquire, was unanimously appointed to that Office,"<sup>1</sup> and *ex-officio* member of the new High Court of Errors and Appeals, which was hereafter to be the highest tribunal, and which was organized three days later. The new High Court was composed of the President of the State, the Judges of the Supreme Court, the Judge of Admiralty and "three persons of known integrity and ability," so that when it was formally opened, on the 6th of April, 1780, its legal members were President Reed, Chief Justice McKean, Justices Atlee, Evans and Bryan, and Judge Francis Hopkinson.<sup>2</sup> The three others were not at once appointed. It is interesting to note also the Register, who was William Bradford, Jr. With this event the forceful Philadelphia leader of the Constitutionalists was lodged in the highest tribunals of the judicial branch of government in Pennsylvania—and, as it proved, for life. While this by no means removed him as a political power, it did remove him from the Assembly and made possible several interesting developments pertinent to the career of Colonel Thomas Smith, of Bedford.

Some time before the close of the Assembly, on February 9, to be exact, Colonel Smith, who was busy with duties of the Quartermaster's service, as letters of that date abundantly show, was on his way to Philadelphia on that business, and to urge the Government to take still further measures for protection of the frontier.<sup>3</sup> A single para-

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<sup>1</sup> Colonial Records, Vol. XII, p. 303.

<sup>2</sup> Acts of Pennsylvania, 1775-1782, p. 272.

<sup>3</sup> The collection of C. P. Humrich, Esq., Carlisle, Pa. He writes under this date to Colonel John Davis at Carlisle, saying, among other things: "The snow is so deep that it was impossible for me to get the returns from the other Posts, & until I can get them it is unnecessary to send the few I have myself"—a glimpse of the conditions of his quartermaster service at this time. In this col-



graph will illustrate some of the difficulties of his work: "The Bearer, Mr. Didier some time ago lent me 3000 Dollars which I expected to have paid him long ago, & am very sorry that his readiness to oblige the Public has been a disadvantage to him; I have bought 73 Bushels of corn from him at Fort Cumberland. \* \* \* I have drawn on you for the sum lent, the Price of the Corn & part of what is owing to myself, in the whole 110,000 which I request you will pay immediately as he is obliged on his way to Baltimore to come round by Carlisle, & if he should meet with any delay it will be a loss to him as he has engaged Horses to meet him there by a certain Day—should you borrow this by single Dollars, I hope you will not give him reason to reflect on me, which he has but to much reason to do already as I faithfully promised to pay him & he expected to have had it before Christmas—had not the Department been so scarce of Money I should think it but Justice to have let him have an equal sum to that which he lent me for the same Time."

Colonel Smith arrived in Philadelphia, and nearly two weeks later, namely, on the 22d of February, 1780, he addressed a letter to President Reed: "If public conduct misrepresented, & intentions misunderstood, were sufficient reasons for me to be silent in all public affairs, I should long ago have declined all share in them, but circumstances often occur when it would be criminal to be silent or neuter; if any misrepresentation of mine can be the means of saving the Life of the meanest Citizen, I shall think myself amply paid for more undeserved obloquy than I ever met with.

"My anxiety for the safety of the frontiers, my having been witness to so many scenes of Distress that thousands of families have had to struggle with for two years past, will I hope, plead my excuse for taking this liberty.

"Your Excellency need not be informed that retaliation is a fundamental Law amongst the Indians, & seems to take the place even of self preservation. They have been severely chastized last summer, & the miseries they will undergo this winter in consequence of it, will render them desperate, & they will certainly make their last effort as soon as the

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lection also is Colonel Smith's "A. D. Q. M. G." account with the United States for November, 1779, the total paid out by him being \$4,767.17, or £1,787 13s. 11d., as exchange ran at that time.

season will permit, or at least they will pay us in kind; the People on the Frontiers have been so much harassed for these several years past, that they can make but very feeble resistance; many of them fled into the interior Counties, & rented Places, which rendered those who remain the weaker; without speedy assistance they cannot possibly stand it, but must abandon their settlement on the first invasion.

“It would undoubtedly be deemed presumption in me,” he continues, “to give my opinion on the mode of defence. I am sensible that I am a very incompetent Judge—five companies were raised last year for that purpose, but, tho,’ I believe the officers who were appointed to command them, did everything in their Power, yet they did not seem to afford so much protection to the Inhabitants as could have been wished, and this I doubt [not] will generally be the case with temporary Troops; most of the mischief will be done before they can be ready for the Field, & the Expense is certainly more than an equal number of permanent Soldiers. To call out the Militia against Indians is liable to equal inconveniences; not one half are fit for that service, & they are scarcely arrived at the Place where the service is to be performed before their Time is expired, putting out of the Question the expence, & the inconveniences that we have already experienced to results from calling out Farmers from their Farms.

“I believe, that at this Time no Money will procure a sufficient Number of Men for the defence of the Frontiers even for a season; pardon me, therefore, if I suggest that if the Legislature was to offer a bounty in Land to such as would engage *during the War* for the defence of the frontiers against the Indians, & to be employed in that service only, & its faith Pledged that they should not be called away on any pretence whatever, & a certain portion of cloathing given them. I think something like this would be more effectual than any other Plan that occurs to me; for there are many young fellows who are complete woodsmen, that are eager to engage against the Indians, if they had any security of such reward at the end of the war; they are perhaps fitter for that service than veteran Troops, capable to take the Indians in their own way; but they cannot for a considerable Time be brought to like the regular service,

nor will they engage without they have the most explicit assurance that they shall be employed only against the Indians.

"On every occasion that I have ever applied to your Excellency," he adds in closing, "I have always found you so ready to do every thing in your Power to defend us from our savage foe, that I need not urge you on this occasion, it is sufficient for me to suggest the necessity of speedy exertions. I rest firmly assured that nothing will be left undone for the protection of those who stand so much in need of it. I wish it was in their power to co-operate effectually with the assistance that may be sent to them from the interior parts of the Country; their own exertions must be feeble through want of Provisions. I am really afraid of famine on the frontiers before harvest; the hard winter has added to the scarcity that was the natural consequence of their being invaded every seed Time and Harvest for years Past."<sup>1</sup> The Assembly handed in resolutions to Council on the subject the same day, and later a conference was held on the subject of the frontiers, and four companies ordered raised for ranger service, with a money bounty. Colonel Smith's entire suggestion was not therefore acted upon.

The late spring session and early autumn or last session of this Assembly of 1779-80 were without especial significance, except that Dr. James Hutchinson succeeded Mr. Bryan and the latter, as head of the Virginia Boundary Commission, before mentioned, reported what finally became the solution of that much-vexed question and secured the extension of Mason and Dixon's line to a meridian at the end of five degrees from the Delaware—the present boundary. But during the summer it became evident, as plans ripened for French coöperation in a final campaign in the south, that the men best able to deal with the financial question must get together and take it up in both the Assembly and Congress. In July, Robert Morris, President Reed and others, most of whose names would at once be recognized as anti-Constitutionalists, announced the organization of the Bank of Pennsylvania on June 17, 1780, with a subscribed stock of £315,000. Robert Morris was at the head of the responsible body, called the Inspectors, and the avowed pur-

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<sup>1</sup> Pennsylvania Archives, Vol. VIII, p. 113.

pose was to supply provisions to the United States army for two months.<sup>1</sup> There seemed to be renewed hopefulness that the end of the conflict was approaching, and the financial question was the chief problem to be faced.<sup>2</sup> Fluctuation of the Continental money was so great that later in the year a public meeting in the Assembly rooms passed a resolution that the ratio be fixed, altho' they had to agree that it be twenty-five to one of specie!<sup>3</sup>

The new purposes were shown in the returns of the next Assembly, which was to meet on October 23, but in fact could not get a quorum until November 3. The most significant change was the appearance of Robert Morris and Frederick Augustus Muhlenberg from the metropolis and General Thomas Mifflin from Berks. Mr. Muhlenberg was made Speaker and Robert Morris was the most influential leader. Passing over the events of the first three weeks of the session to the 23d of November, the day of election of delegates to Congress, this day had been set aside on the 16th for this purpose, and they picked out strong conservative men, as far as possible. These were Joseph Montgomery, Samuel J. Atlee, Henry Wynkoop<sup>4</sup> of Bucks and Thomas Smith of Bedford. Immediately thereafter a committee of five, headed by Mr. Morris himself and including General Mifflin and Major James Smith of York, was appointed to draft instructions. This was the session at which impeachment proceedings were brought against Hon. Francis Hopkinson, Judge of Admiralty, so that the instructions to the delegates were not finally adopted until exactly a month later, December 23, and they were then marked "(Private)."<sup>5</sup>

"Confiding in your integrity, ability and attachment to the cause and interests of the united states," this most interesting paper proceeds, "we have appointed you to represent this commonwealth in Congress.

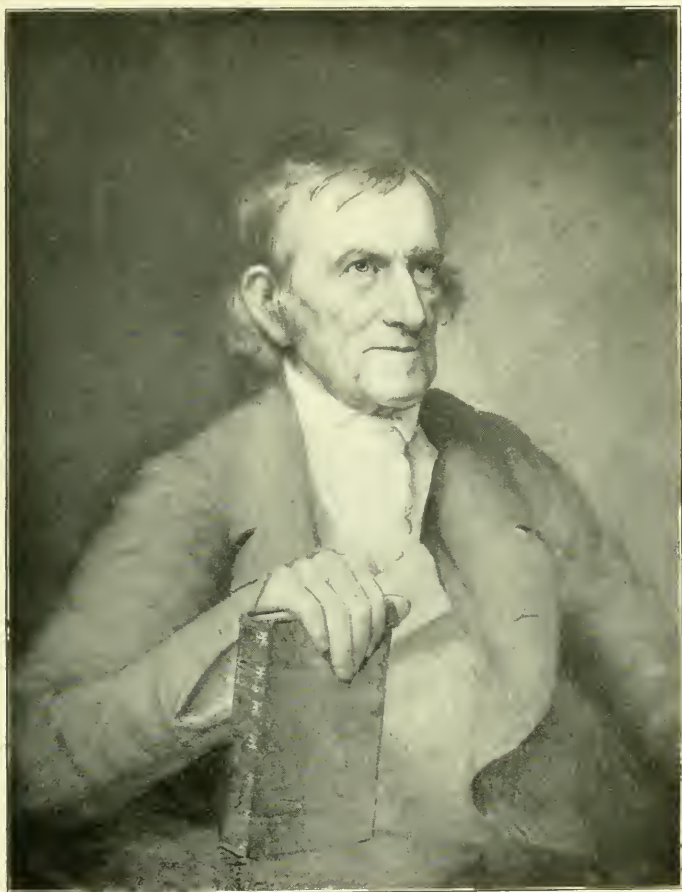
<sup>1</sup> The *Pennsylvania Gazette*, July 5, 1780.

<sup>2</sup> It may be noted that Arnold's treason came to light during the autumn of 1780.

<sup>3</sup> *Gazette* of November 22, 1780.

<sup>4</sup> Judge Henry Wynkoop had been appointed to the High Court of Errors and Appeals on the 20th, three days before, as also had Major James Smith, of York, two of the three persons of known integrity and ability. Colonial Records, Vol. XII, p. 548.

<sup>5</sup> Journals of Assembly, Vol. I, p. 564.



HENRY WYNKOOP  
Half-tone of painting in possession of  
Mrs. W. L. Pusser, Boston





"The trust reposed in delegates to Congress is at all times important: at this juncture it is peculiarly so. We cannot, nor do we wish to, direct your deliberations and your votes in every question that may come before you. We trust in your patriotism and good sense, that you will deliberate and vote in a manner which will entitle you to the approbation, the support and the gratitude of your constituents.

"The following subjects are, however, of more than ordinary magnitude, on which we think it necessary to give you our sentiments:

"*First.* You will do everything in your power to retrieve the finances of the united states from the disorder into which they have unfortunately fallen. As one means of accomplishing this desirable end, we recommend to you earnestly to promote frugality and œconomy in the public expenditures, to urge the reduction of all unnecessary offices and officers, and to ascertain with accuracy the pay, salaries, and other allowances of officers necessarily employed.

"*Second.* The western or late crown lands are an object which deserves particular attention. We apprehend that the property of those lands is devolved to the united states. If a proper use is made of them they may be productive of ample funds for carrying on the present just and necessary war, and consequently for alleviating the burthens of this and the other confederated states.

"*Third.* The state of *Connecticut* still persists in her claim to a very considerable part of *Pennsylvania*, and has hitherto refused to comply with the very just and equitable proposals made on the part of this commonwealth for finally determining the controversy between the two states. You will carefully watch and strenuously oppose every attempt that may [be] made to injure your constituents on this subject; and you will endeavor, by all proper means, to bring it to an amicable accommodation, or to a legal decision.

"*Fourth.* Before you vote for the appointment of any officer, you will enquire into his character and his fitness for the office for which he may be named. You will choose with impartiality and without favor; you will reject with candor and without prejudice.

"*Fifth.* Before you vote for the removal of any officer, you will maturely weigh his conduct in office; you will consider the necessity or the evident propriety of removing him: And when you vote to remove you will afford no room for suspicion that your vote has been dictated by an unsteadiness of politics, an unworthy influence, or a desire to open a door for the introduction of a favorite successor.

"*Last.* Imposts on trade appear to us absolutely necessary at this time. But as such imposts should be generally established in order to prevent any state from taking advantage of a neighbor, we instruct you to urge Congress to recommend to the several states in union such a system of imposts as may, without injury to commerce, produce a certain and beneficial revenue."

It will thus be seen that Mr. Morris and his associates had begun to define a financial policy for Congress, the chief elements of which were economy, sale of public lands and a tariff for revenue. These were the main points of the instructions, the others being the purity of the public service and settlement of the Connecticut claims to Pennsylvania territory. It is true they had a tremendous problem to face, and these efforts, begun so late and under the feeble power granted to Congress by the Articles of Confederation, could not ward off the suffering that must be the logical result of floods of paper issues far beyond, indeed, many times beyond, the needs of a circulating medium. "And with wagon loads thus cheaply obtained," said Samuel Breck in an address before the American Philosophical Society in 1843, "they carried on the campaigns of the two years, 1778 and 1779, keeping an army of thirty or forty thousand men in the field, issuing paper to the amount of sixty-three millions for the former year and seventy-two millions for the latter; and thus, with an active printing press and a few commissioners hired by the day or by the job to sign the bills, ways and means were found to defray almost the whole expense of the civil list, the army and navy and contingencies. There was, indeed, a little hard money passing through the treasury. The exact sums received in both those years having been officially reported to Congress, stand recorded on their journals. If it were not attested in this

authentic shape it would be difficult to believe it. Marvelous as it may appear, the aggregate of gold and silver received into the treasury for the year 1778 was only seventy-eight thousand six hundred and sixty-six dollars [\$78,666]; and for the year 1779 the sum of seventy-three thousand dollars [\$73,000]; so that the whole machinery of government was carried on, for *two entire years*, as far as concerned the agency of specie, with one hundred and fifty-one thousand six hundred and sixty-six dollars!! So small an expenditure, *in metallic currency*, shows the powerful agency of paper in the belligerent operations at that critical period; performing as it did, in spite of counterfeits and depreciation, the office of hard money.”<sup>1</sup>

With these conditions before them, the Pennsylvania delegates to Congress gathered one by one in the eastern chamber of the State House, at Sixth and Chestnut streets, after their appointment on November 22, 1780. Mr. Clymer attended to present the delegates' credentials on the 24th, and would have had occasion the next day to vote on removal of the military stores department of the United States to Carlisle, Pennsylvania, and on the 30th on the establishment of a Commissary of Purchases, with Colonel Ephraim Blaine for Commissary-General, had he taken his seat, which he did not do until later. On December 6 Mr. Atlee arrived and was followed by Mr. Montgomery two days later.<sup>2</sup> They had opportunity to vote on the matter of Continental forces, containing neither Pennsylvanians nor citizens of Connecticut, in the fort at Wyoming. Judge Wynkoop took his seat on the 19th, and the first thing that came up was consideration of the manner of receiving into the Continental Treasury specie at the rate of “75 Continental dollars for 1 of specie.” These members had occasion, on January 10, 1781, to take part in the creation

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<sup>1</sup> Historical Sketch of Continental Paper Money, by Samuel Breck, p. 13, Philadelphia, 1843. The depreciation finally became so great that in mockery and fun tradesmen would paper their walls with it and rollicking sailors have jackets made of it.

<sup>2</sup> Rev. Joseph Montgomery, of Lancaster county, was born in 1733, a son of Scotch-Irish Presbyterian parents. He graduated from the College of New Jersey in 1755. Among his college-mates were Dr. John Ewing, Dr. William Shippen and President Joseph Reed. He was a Presbyterian minister of prominence, and became a chaplain in the Revolutionary army in 1777, and was elected to Congress late in 1780. He died in 1794.

of a Department of Foreign Affairs. On the 15th Congress issued a plea for more funds, saying "It was found expedient to discontinue the emission of paper money." This was for the pay of the army in the South.

As Colonel Smith had far the longest journey to make, it was February 3, 1781,<sup>1</sup> before he was able to take his seat, this time on the east side of the State House hall, opposite the old Supreme Court room in which he had seen such varied services for his adopted State. In this chamber was the capitol of the struggling young nation, not yet, indeed, legally a nation, for the last of the States had not yet ratified the "Articles." He had been called to join in its councils and aid in restoring its finances—an almost impossible problem, to be sure, so long as the "Articles," which gave Congress so little power, were their Constitution. Nevertheless, he was called to do what could be done, and was well assured that he would be supported so long as there was a majority made up of moderate "anti-Constitutionalists" in the Assembly across the hall. He realized the magnitude of the work of Congress, too, which was not less, but greater even than it was five years before. "The business I have upon my mind," wrote John Adams, in the Congress of 1775 at Philadelphia, to his wife at home, "has been as great and important as can be intrusted to man, & the Difficulty and Intricacy of it is prodigious. When 50 or 60 men have a Constitution to form for a great empire, at the same time that they have a country of 1500 miles extent to fortify, millions to arm and train, a naval power to begin, an extensive commerce to regulate, numerous tribes of Indians to negotiate with, a standing army of 27,000 men to raise, pay, victual and officer, I really pity these 50 or 60 men."<sup>2</sup> The "50 or 60 men" had done this, in the only way open to them, by paper money, and now it was left to about half that number to make the paper promises good.

Colonel Smith's very first day in Congress witnessed the passage of a resolution recommending to the States that Congress be given power to take charge of a general system of duties on imports on a five per cent. *ad valorem*

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<sup>1</sup> Journals of Congress, Vol. VII, p. 21.

<sup>2</sup> Dated July 24, 1775, and in the Yeates Collection of Manuscripts at the Pennsylvania Historical Society.

basis, to begin May 1 next following, for the sole purpose of discharging the public debt, both principal and interest—"the said duties to be continued until the said debts shall be fully and finally discharged." As May 1 was so near at hand, Congress, on the 7th of February, *i. e.*, four days later, provided that it should begin on the day the last State necessary consented.

On the same day, namely the 7th, the further consideration of the organization of civil executive departments came up, and it was resolved that a Department of Finance should be created, with a superintendent, who should have general supervision over all matters of Congressional finance. He was to examine into the condition of public accounts, digest a plan for improving the financial side of government, and, in short, to be the forerunner of our modern Secretary of the Treasury. Two days later his salary was fixed at \$6,000, one thousand more than the Secretary of War or "Marine," as those new officers were called. The plan required several days of consideration. Meanwhile, on the 12th, Maryland gave instructions to her delegates to sign the "Articles," without, however, affecting her right to Western lands claimed by her. As she was the last State to sign to make the confederation a fact, preparations were made to celebrate the event. On the 20th all troops, with certain exceptions, were ordered to the army in Virginia, to prepare for what proved to be the final campaign of the long struggle for national existence. Immediately following this, Hon. William Floyd, of New York, nominated Robert Morris, Esq., of Pennsylvania, as Superintendent of Finance, and he was unanimously elected. It was plain that if Mr. Morris was recognized as the leading financier of the metropolis and capital, his services might naturally be availed of in this great crisis of the nation.

On a birthday that it has long been a delight to honor, namely, February 22, while General Washington was closing in on Cornwallis and his army, the last Maryland delegate took his seat, and a day, a week later, was set for completing the confederation. On the 26th Colonel Smith saw the Pennsylvania Chief Justice, Hon. Thomas McKean, enter the chamber as the representative of Delaware, and on the following day Captain John Paul Jones



was voted their appreciation of his destruction of the *Serapis*.

Twelve o'clock, Thursday, March 1, the hour for completing the confederation arrived, and now, after over three years since Congress had submitted them to the several States, the Articles of Confederation were ratified and announced.<sup>1</sup> "This happy event," said the *Gazette*, when it was issued on the 7th at the office near the great market in High street, near the court house,<sup>2</sup> "was immediately announced to the public by the discharge of the artillery on land, and the cannon of the shipping in the river Delaware. At two o'clock His Excellency, the President of Congress, received on this occasion the congratulations of the Hon. the Minister Plenipotentiary of France, and of the Legislative and Executive Bodies of this State, of the Civil and Military Officers, sundry strangers of distinction in town, and of many of the principal inhabitants. The evening was closed by an elegant exhibition of fireworks. The Ariel frigate, commanded by the gallant John Paul Jones, fired a *feu de joye*, and was beautifully decorated with a variety of streamers in the day, and ornamented with a brilliant appearance of lights in the night. Thus will the *first of March, 1781*, be a day memorable in the annals of America for the final ratification of the Confederation and perpetual Union of the Thirteen States of America—A Union, begun by necessity, cemented by oppression and common danger, and now finally consolidated into a perpetual confederacy of these new and rising States: And thus the United States of America, having amidst the calamities of a destructive war, established a solid foundation of greatness, are growing up into consequence among the nations, while their haughty enemy, Britain, with all her boasted wealth and grandeur, instead of bringing them to *her feet* and reducing them to unconditional submission, finds her hopes blasted, her power crumbling to pieces, and the empire which, with overbearing insolence and brutality she exer-

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<sup>1</sup> The Articles were first agreed on and submitted for ratification November 15, 1777.

<sup>2</sup> Market street of to-day, at Second street.



cised on the ocean, divided among her insulted neighbors.”<sup>1</sup>

On the next day the minutes were proudly headed “The United States in Congress assembled, March 2, 1781”—and the members present in this first National Congress had their names formally spread upon the minutes in honor of the event. Among these were Samuel Adams of Massachusetts, Witherspoon of New Jersey, Atlee, Wynkoop and Smith of Pennsylvania, Thomas McKean of Delaware and James Madison of Virginia. It had been not quite five years since the independence of the States composing the young nation had been declared in this same room—a few days before Colonel Smith and his associates had gathered in the room across the hall to make a State Constitution. A hallowed room is this; let it ever be held sacred!

On March 3 the last of the Pennsylvania delegates, George Clymer, took his seat. Congress was a secret body in those days, and even the yeas and nays were suppressed in the minutes. It was beginning to be felt that the reason for this was long past, that but few sessions need be behind closed doors, and that yeas and nays might be had at any time. On the 6th it was determined that Tuesdays, Thursdays and Saturdays should be set aside for the subject of finance, so that much of the attention of Congress was now devoted to that theme. On the 16th a resolution was passed urging the States to declare that all debts should be actually paid at current exchange rates, and that no tender value shall be required but what was actually current and real. This drew forth the yeas and nays, and there was but a single “no,” and this from New Jersey. The same day \$1,500,000 was called for, from the States, and the emitted bills to cover this were to be received at the treasury as equal to specie. A committee of one from each State was appointed to make out the quota for the States, Mr. Clymer appearing for Pennsylvania.

On March 19 the yeas and nays were again asked for on the question of drawing on the United States Minister

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<sup>1</sup>In the same issue the Council announce that the legal rate of exchange of paper for specie is 75 to 1.

at Versailles for \$55,331 1-3 to fulfill a contract for shot and shells. It passed by a large majority. On the next day on a technical correction in the minutes the yeas were desired, and the majority declared against the technical point, Colonel Smith being among them. Immediately following this, however, he was on the losing side, on a vote to not require Superintendent of Finance Morris to relinquish all connection with business enterprises, Montgomery, Clymer and Smith voting that it should not be required. An excellent letter from Mr. Morris was then read, in which he declined to violate contracts already undertaken, and on another vote Mr. Morris' friends gained their point. On the 21st Colonel Smith was absent, but it was quite evident by this time that the Pennsylvania delegation was a unit on financial matters at least. It was voted at this session to give Superintendent Morris control of his assistants. Colonel Smith was also absent on the 22d, when the question of a tariff for revenue came up, and a statement made that the annual interest on the public debt was now over a million dollars. This was in the form of a request to Connecticut to make her laws agreeable to vesting in Congress the power of levying duties. Mr. Morris accepted the office of Superintendent of Finance on May 14.

Just how many days Colonel Smith was absent is not known, but a call of the yeas and nays on May 18 shows him voting "no" with Mr. Atlee, and carrying the delegation vote against giving General Wayne the power to impress supplies in order to go to the Southern army, Pennsylvania being the only State to vote so. On the 22d of May, Pennsylvania, Georgia and North Carolina were on the losing side in a vote to have the National Treasury accept local exchange rates at the time payments were made. This was on a call for yeas and nays by Colonel Smith himself. The same day vigorous resolutions were passed, taking measures to fund the national debt and place it as loans at interest, and also urging the States to respond to the calls for money, and directing the National Treasurer to draw on the several States for the several amounts, to be payable in thirty days. On the 23d, on a resolution to move prisoners to Massachusetts, he voted no, against both Clymer and Atlee, but

on "Massachusetts" being removed from the resolution and discretion given the Board of War in the matter, he voted for it and it was passed.

Congress had various details from day to day at the State House square in carrying on the routine of its work which, of course, cannot be considered in brief space, nor is such consideration necessary in order to gain some conception of Colonel Thomas Smith's relation to its work. On the 26th of May, however, a very important measure came up, in action on a recommendation by Superintendent of Finance Morris, on the 17th instant, that his plan for a National Bank of the United States of North America be adopted. The committee which reported in favor of it included Mr. Clymer as the Pennsylvania member, and the plan itself mentioned him and John Nixon as the organizers of the institution.<sup>1</sup> The corporate name was to be "The President, Directors and Company of the Bank of North America," and it was plainly suggested by and modeled after the previously mentioned Bank of Pennsylvania. Forthwith began the famous and long-continued fight against a bank fostered by the nation, with which every student of our history is familiar. The capital was to be \$400,000 at first; there were to be twelve directors, and the Superintendent of Finance was to be its inspector. When the vote came, Colonel Smith called for the yeas and nays. The resolution read: "That Congress do approve of the plan for establishing a national bank in these United States, submitted to their consideration by Mr. R. Morris on the 17th of May, 1781; and that they will promote and support the same by such ways and means, from time to time, as may appear necessary for the institution, and consistent with the public good; that the subscribers to the said bank shall be incorporated agreeably to the principles and terms of the plan," etc. Whether Colonel Smith objected to the plan in detail or to the whole principle of a national financial monopoly, as it was proposed to make it, but which purpose did not appear

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<sup>1</sup> "Journals of Congress, and of the United States in Congress Assembled, for the year 1781," Vol. VII, p. 108, Philadelphia, 1781. (Claypoole's edition published by order of Congress.) The edition of 1800 is so inaccurate, in this instance, as to make the resolution on this plan read directly opposite to its true reading.

in the plan or resolution, is not known; but when the yeas and nays were taken, Colonel Smith voted against it, thereby dividing the State vote, Mr. Clymer voting for it. He was in good company, however, for James Madison of Virginia voted likewise, and both of the Massachusetts delegates joined them. Of course, it was in vain. The plan was adopted. Colonel Smith could go a good distance with Superintendent Morris, but he apparently could not go to the extent of a Congressional monopoly of the banking business, for immediately after the vote, it should be added, other resolutions were passed, recommending the States to forbid other banks and making the issue of this one legal tender.<sup>1</sup>

On June 2 an effort was made to have the States suspend issuing certain bills under the act of March 18, 1780, which was carried, but on an effort to qualify this Colonel Smith joined the majority in voting against any qualification. On Monday, June 4, he was made chairman of a committee of three to meet the Supreme Executive Council of Pennsylvania, as requested, to discuss Quartermasters' and Commissaries' certificates. This was the first committee on which he served. Ten days later, the 14th of June, there came up the matter of exchanging General Burgoyne for the Hon. Henry Laurens. Mr. Atlee called for the yeas and nays, and he, Mr. Clymer and Colonel Smith voted against it, carrying their State vote against Mr. Montgomery—the only State which voted no, except New Jersey. Mr. Carroll of Maryland and Mr. Madison of Virginia joined them, too, but in vain. A division occurred, also, on the 16th, when the question of court-martial sentences to punishment came up, in which the house was pretty evenly divided, the whole Pennsylvania delegation being in favor of it, but it was lost. So, too, on the 18th there was a division on the abolition of State purchasing or appointing power in the clothing depart-

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<sup>1</sup> The first page of *The Gazette* of June 6 was given up to the plan and Mr. Morris' excellent explanation of it. Mr. Clymer and Mr. Nixon were the directors of the Bank of Pennsylvania.

<sup>2</sup> Pennsylvania had not fancied the sending of Mr. Laurens to practically supersede Franklin—at least admirers of Franklin did not. The Revolution had its struggles over the young and old man question, as well as later periods.

ment of the army, the whole Keystone section voting in favor of it with successful results.

On the 20th there was another division on the question of payment of a certain account by the Superintendent of Finance, in which the Pennsylvania delegation voted solidly for it, and it was passed. On the 22d Colonel Smith was made chairman of a committee of four, one of whom was Thomas McKean, to determine on the allowance to be made those to whom was assigned the destruction of recalled currency. June 25 had been set for the consideration of a Court of Appeals in cases of capture, and during progress Colonel Smith called for the yeas and nays as to whether Judges of it should hold office during good behavior. He and the whole of his State's delegation voted in favor of it, but the New England States and New Jersey voted against it, with a no from Mr. Madison, and it was lost. On the 28th he was made a member of a committee of three to arrange the transfer of various boards, whose work was to be included in the new Department of Finance. This committee had other matters referred to it, and on July 6 it reported in favor of validating the acts of Superintendent Morris done while in office, but previous to taking the oath of it. It also reported favoring the late act of the Assembly of Pennsylvania, whose State paper could not now buy supplies, authorizing the Superintendent of Finance to do so and charge it to the State account. This was voted by Congress as distinctly a move forward, indicating the value of the new Department of Finance. On the same day an effort was made to postpone the election of a Secretary of Marine to the next session, Colonel Smith's and Mr. Clymer's votes carrying Pennsylvania for it, but it was lost. Another division came up on July 7 on the question of directing certain supplies over the head of the Southern department, in which he was inclined to respect the discretion of the head of the department.

On Tuesday, July 10, he joined in the election of the Chief Justice of Pennsylvania and representative of Delaware, Hon. Thomas McKean, to the Presidency of Congress. Immediately thereafter he seconded a motion for a committee of five to confer with the Superintendent of Finance on a plan to pay expenses of such delegates as



from the events of the war were unable to support themselves and attend Congress, and concerning certain salaries. The next day he called for a division on the question of the future pay of Baron d'Arendt, and the Pennsylvania delegation voted with the majority that it should not be considered, although they voted for payment for his past services. There was a similar division on the 16th of July, and also on the 21st, Colonel Smith being on the losing side, regarding postponement of consideration of a loan to certain persons from Charlestown. On the 23d an attempt was made to have all clothing given by the various States to their troops credited to their tax quota, but he joined the majority against it.

Early in August he was again absent, but on the 20th, when certain bills, drawn by British prisoners in Connecticut, were reported protested, the matter was referred to a committee composed of Messrs. Boudinot, Thomas Smith and George Clymer. On the same day he voted affirmatively, with the majority, on conditions for the admission of Vermont. His committee reported on the 21st of August in favor of General Washington remonstrating against the protesting of the above bills and reporting the results to Congress.

He was absent again late in August, but it was a common custom among delegates to relieve one another. Indeed, all the delegates of a State were rarely present during these continuous sessions of Congress in the old east chamber of the State House. There being no means of knowing when he returned, it can only be said that on September 12 his committee reported in favor of Superintendent Morris being authorized to fit out such ships of war as seem to him necessary for the public good, and it was passed.<sup>1</sup> On the 21st he voted on the losing side in favor of holding back certain hospital appointments until a report was had on the subject. Six days later, when one of the two new delegates from Georgia, Hon. Noble Wymerly Jones, took his seat in the old east chamber of the State House at Philadelphia, Colonel Smith became acquainted with a man whose descendants were destined to become intimately connected

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<sup>1</sup>This was pursuant to certain letters previously received from Mr. Morris on the subject.



with descendants of his own in the years that were to come, but it is not known whether any especial friendship occurred between the two members at this time.

It was October 5 before a matter came up that left record of Colonel Smith's personal action, although, of course, he, as well as others, was active in the great bulk of business in which members' names, of course, do not appear. These divisions, however, tend to illustrate to a degree—at least so far as they can be understood at this distance—the relative character of the actions of men who happened to differ on the points at issue. Mr. Montgomery made a motion to allow the Pennsylvania and Delaware militia, in service, to disband, with provision for gathering at once, if necessary. Mr. Atlee and Mr. Clymer supported him, but Colonel Smith, with knowledge of the operations of the army in closing in on Cornwallis' army, felt that no risk should be run, voted against it, and proved to be with those who won. On October 15 the question of abolishing franks after the 1st of December following won his vote, but he was overruled. In passing, it will be of interest to note that the question of claims to public lands came up, especially of the United Illinois and Wabash companies, whose agent was J. Wilson, and of the Indiana company, represented by William Trent; and on the 16th, although the Pennsylvania members, Atlee and Clymer, voted that these claims might be received, it was lost.<sup>1</sup> On the 19th a Post Office Department was established, with a Postmaster-General.

On the 23d occurred the unique event of a President of Congress resigning because he must perform his duties as a Chief Justice of a State, and although his resignation was accepted, he was unanimously asked to continue as long as he could. It was a week of unique events, for on the next day came General Washington's announcement of the surrender of Lord Cornwallis, dated the 19th of October, and at two o'clock Congress adjourned to the "Dutch Lutheran Church" to engage in thanksgiving. The next day, when it was proposed to direct General Washington to detain Cornwallis until further orders of Congress, a rousing majority voted against it, Colonel Smith among the number.

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<sup>1</sup> Colonel Smith was not present.

Much of the work of the next several days was an echo of the surrender, such as the extension of congratulations and passing of resolutions of thanks to various parts of the army and navy.

On November 2, however, the financial problems again came before them, for these were their chief business now, even more than before. An effort was made to add \$93,400 to the quota of Connecticut for the \$8,000,000 ordered two days before, whereupon Colonel Smith voting against it, and also against Mr. Atlee and Mr. Montgomery, was one of a successful majority. On the reorganization of Congress on the 5th, Messrs. Montgomery, Atlee and Smith were in their places, but it was the 14th before a matter calling for division came up, this time being called for by Colonel Smith himself. It was on consideration of the claims to public lands of the Illinois, Indiana, Wabash and Vandalia companies, at a certain specified date, and he wanted an amendment to the effect that eleven States must be present. He wanted them considered, but in a fair way. The whole matter was defeated, however. On this day the Pennsylvania-Connecticut hearing was set for the fourth Monday in June, 1782. On November 16 an effort was again made to direct General Washington in certain details, and Colonel Smith joined a vigorous majority against it. The same day, on a vote construing a former resolution regarding promotions, he and Mr. Montgomery voted in the majority, saying that it did not prevent Congress from promoting as it pleased for extraordinary merit. Notwithstanding this, he voted against the promotion of Brigadier-General Knox to be Major-General.

On the 19th he seconded a motion to ask Richard Peters to continue upon his duties until the Secretary of War was ready to assume office, and on the 21st he was one of a large majority asking the States to take a census. Across the hall, on this day, the Assembly reelected "the Honorable Joseph Montgomery, Thomas Smith (of the county of Bedford), George Clymer, Samuel J. Atlee and Henry Wynkoop, Esquires," and on the following day, all but Judge Wynkoop attended Congress as usual, and he, too, attended later.<sup>1</sup> On the 22d, also, Mr. Montgomery and

<sup>1</sup> Minutes of the First Session of the Sixth General Assembly, 1781-'84, p. 516.

Colonel Smith secured the establishment of the post office at the beginning of the year, instead of December 1. The 28th was made notable by a visit from General Washington. He and Mrs. Washington had arrived on Monday, the 26th, amid great rejoicing, and Congress, the Assembly and Council, and indeed everybody, hastened to do them honor. The State House Square, at Sixth and Chestnut streets, was a scene of joy and gladness during that November day, in honor of the great Commander. The *Gazette* came out the same Wednesday, with a most interesting and appreciative sketch of the life of the General, which, curiously enough, was an English article, which had appeared abroad in the *Westminster Magazine* the previous August; the editor, in a foot-note, draws attention to the fact that "It is somewhat singular, that even in England not one reflection was ever cast, or the least disrespectful word uttered against him."<sup>1</sup> The visit was treated as, in a degree, a celebration of the victory at Yorktown, by the capital and metropolis of the new nation.

At one o'clock Congress was assembled at the old east chamber of the State House, forever famous for the birth of a new nation nearly five years before. General Washington entered and was addressed by the President, who, besides offering felicitations, expressed the hope that the General would remain some time in Philadelphia, and while resting from his labors, give Congress counsel in the reorganization of the army for the work yet necessary to be done. Colonel Smith, who was soon to become Washington's attorney, and whose devotion to him was shown on many occasions, must have felt peculiar pleasure, as he listened to the General's happy response. "Mr. President," said he, "I feel very sensibly the favorable declaration of Congress expressed by your Excellency. This fresh proof of their approbation cannot fail of making a deep impression upon me, and my study shall be to deserve a continuance of it. It is with peculiar pleasure I hear that it is the fixed purpose of Congress to exhort the States to the most vigorous and timely exertions; a compliance on their part will, I persuade myself, be productive of the most happy consequences. I shall yield a ready obedience to the expectation of Congress,

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<sup>1</sup> *Pennsylvania Gazette*, Wednesday, November 28, 1781.

and give every assistance in my power to their committee. I am obliged by the goodness of Congress in making my personal ease and convenience a part of their concern. Should the service require my attendance with the army upon the North river or elsewhere, I shall repair to whatever place my duty calls, with the same pleasure that I remain in this city."

The day was a happy one for Colonel Smith for other reasons, also, for on the morrow he was to celebrate the happiest event of his own life. He had been a Congressman about a year, in almost constant service, and was a comparatively young man of only thirty-six years. It has been intimated before that when he had been in the convention of '76 and the Assembly, as well as on other visits to the capital, he had not only been much at the country seat of his brother, Provost Smith, at the then beautiful Falls of Schuylkill, northwest of the city, but had also gone a little farther up that river to the far richer scenery of the glens of Wissahickon; and now one of the compensations of the arduous responsibilities of Congress was the opportunity it gave, during the past year, of visiting the daughter of John Van Deren, who owned a well-known old mill there, as General St. Clair did in the far West at his home at Ligonier. In a letter to his mother three years later, Colonel Smith, in telling of his various public offices, last of which he mentioned his membership of Congress, says: "Although the Public Offices which I have borne were not profitable; yet the last, by obliging me to remain two years in Philadelphia, gave me an opportunity of often seeing a young Lady with whom I had been acquainted for some years."<sup>1</sup> The beautiful Wissahickon had no doubt been the scene of many a courtship before, as it has been since that of Congressman Smith and Mr. Van Deren's eldest daughter, Letitia, but it never witnessed a truer one.

Dr. William Smith, since the Assembly had taken away what ought to have remained his life-work, had gone

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<sup>1</sup> Letter dated Carlisle, December 3, 1784, addressed to his mother, "Mrs. Elizabeth Lawrence, in Cruden, Aberdeenshire, To the care of Dr. P. Smith at Slanes Castle," De Renne Papers, Wormsloe, Savannah, Georgia. Miss Van Deren was born in October, 1759, and was now twenty-two years old.





THE WISSAHICKON  
Amid Scenes of Colonel Smith's Courtship  
Half-tone of Photograph by Rau





to Chestertown, Maryland, where he was rector and head of the Kent County School, which was soon to become Washington College. From there he came to Philadelphia for the purpose of solemnizing the marriage of his brother.<sup>1</sup> The ceremony occurred on Thursday, November 29, 1781, when the Wissahickon was robed in all its autumnal glory. Colonel Smith took a vacation, his place at the State House being temporarily taken by Judge Wynkoop. Little record of either wedding or honeymoon has been kept, but a far better one has been, namely, his own estimate of his wife, written to his mother in the letter above quoted after three years of married life. "To say she is beautiful," he writes, "would be saying little, for although she has a very large share of it, it will fade by age; but the beauty of her mind is far superior to that of her person & that will increase with years—had [I] my choice of all the women in the world and had every one of these women all the Treasure in the world, I would most certainly (if my choice to make) prefer her to them all," and then in a burst of filial confidence so sacred that one bows before it, he exclaims: "O my mother, I want words to paint my happiness, in the married state, to you—I want thoughts to conceive my gratitude for it—indeed it is too great to last—for it was not intended by our Maker that we should enjoy complete happiness in this world in which we are placed in a state of probation—my happiness is as great as I can conceive that of any human being can be; but it is not complete, for the thought that it is too great to last prevents the enjoyment of it.—I wish I may be grateful while it does last & resigned to the will of Providence if I should be deprived of it."

How long a vacation Colonel and Mrs. Smith took after the wedding is not known, as the journals of Congress do not indicate the presence or absence of members, except when a division is called for, and there was nothing of that kind for some time. The second day after the wedding at Wissahickon, however, was notable in Congress as witnessing the incorporation of the Bank of North America, of which, it may be mentioned, James Wilson was a director.

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<sup>1</sup> The very day of the marriage the Assembly read a petition of Dr. Smith, asking that justice be done him—and though long delayed, it was yet to be done.

On February 11, 1782, Mr. Randolph, Mr. Boudinot and Colonel Smith reported on a memorial from James Wilson, who appealed, for his clients, against a sentence of the Court of Admiralty in Connecticut, and it was referred to the Court of Appeals. He took part in a vote on the 19th, and also in one on the 23d on method of exchange of Cornwallis, in both of which yeas and nays were called for. On the 25th of February, on the motion to select May 1 as the date for excepting vessels carrying British goods from capture, he opposed his three colleagues and voted with the majority to secure an earlier date.

On March 1 he took part in a long fight over Vermont and its relations to New York and New Hampshire. Naval affairs received much attention during these days. On the 14th he voted with the majority in favor of reducing the pay of the Quartermaster-General to that of a Major-General, and on the 22d voted in the minority in favor of promoting General Moultrie, and with the majority for the promotion of General Knox. On April 1 the Vermont question came up again and was referred to a committee. On April 15 came up the question of a Vice-President of Congress. Colonel Smith objected to it for any given length of time, although he supported it as a measure during the indisposition of the President. On the next day the report of his Public Lands Committee was considered, though no conclusion was reached. On the 17th he took part in another vigorous fight over the admission of Vermont, with no conclusion, as he did on a similar contest on the public lands question the next day. Another, about the payment of Connecticut troops, also occurred.

May 1 the public lands matter again came up, and, after a spirited fight, in which Colonel Smith was in favor of setting a time for its consideration, at which all the States could be represented, the yeas and nays were called to close the contest by adjournment. The report of this committee, of which he was one, was spread on the minutes, however, and is one of the most just papers ever placed before Congress. It recommended the acceptance of the cession of New York's western lands; asked Virginia to make a new proposal making simple relinquishment of lands west of a reasonable boundary; recom-



MRS. THOMAS SMITH  
(Letitia Van Deren)  
Half-tone of miniature in possession of  
W. J. De Renne, Esq., Savannah



mended the titles of Croghan's *Indiana* company as legitimate; denied the legitimacy of both the Illinois and Wabash companies, and recommended that Congress have future control of all relations to Indian lands, to settlement and to the creation of new States. On the 6th it was voted to postpone consideration of the question, plainly indicating that Congress considered this, as it really was, one of the most important questions before it.

Several motions came up in which he took part in the next few days, in some of which he opposed efforts to promote certain officers, but as the significance of the action is not known, it needs no further notice. On the 13th the French Minister was received.

Colonel Smith, on June 3, moved and secured the reconsideration of the Public Salaries bill, which was before the House in May. This was evidently at the request of the Superintendent of Finance. On June 20 a seal for the United States was chosen. On the 24th the Connecticut-Pennsylvania case came up, in which Attorney-General William Bradford, Joseph Reed, James Wilson and Jonathan Dickinson Sergeant represented Pennsylvania. On the 25th an effort was made to not allow delegates of the interested States to sit during the hearing; but Colonel Smith and Judge Wynkoop joined a vigorous majority in opposing such a movement, and on account of the absence of certain agents of Connecticut the matter was postponed. On the 27th, however, the Pennsylvania delegates joined a majority in reconsidering the disqualification of delegates of interested States sitting at a hearing, although Connecticut objected. An effort was made to postpone the controversy until the war was over, but it was not successful.

On July 16 the Pennsylvania-Connecticut controversy again came up, and as the agents of the latter State denied the validity of the powers of attorney granted by the Supreme Executive Council of Pennsylvania, Colonel Smith called for a test vote as to whether Congress should assure the delegates that it considered them valid, and Congress refused to commit itself. The case was allowed to proceed. After the preliminary hearing, however, Colonel Smith called for a test vote and their validity was acknowledged, and the agents of each State were directed to choose a

court, according to the ninth of the Articles of Confederation. On the 19th no member of Pennsylvania was present, but three of them were there on the 22d, and voted on the retirement of General Parsons, on account of ill health. On the 26th Colonel Smith voted with the majority in favor of granting Baron Steuben traveling expenses. On the 31st another effort was made to get Congress to act on the public lands question, at least to set a date. Colonel Smith favored it, but it was lost.

On August 7 he voted favorably on a measure of economy, recommended by a committee on the subject, and on the 14th voted with the minority against repealing the order for an investigation of General Gates. He voted, on the 20th, in favor of referring to a committee certain matters relating to a proposed treaty of peace. On the 28th the court on the Pennsylvania-Connecticut claims was commissioned, to meet at Trenton on the following November 12.

September 5 a committee on inquiring into the affairs of the post office reported, Colonel Smith being one of them. He also secured a resolution directing General Washington to use the Pennsylvania line as he deemed best, notwithstanding the resolutions of February 20 and March 19. The public lands question was called up again, but Colonel Smith, with the majority, objected—for all these efforts were contrary to the recommendations of his committee. On the 6th, however, Dr. Witherspoon placed the intent of the committee's report in a short resolution and had it adopted. Colonel Smith, on the 10th, secured a resolution calling for a list of all seamen captured or paroled. On the same day the quotas were reported, for payment of \$1,200,000 for interest on the public debt, and various efforts were made to change the quotas, but he joined the majority in opposing any, until, apparently in good-natured mockery, he himself tried to get a part of Pennsylvania's quota placed on Virginia. This may have been because, for the first time, it is believed, the quota of Virginia was smaller than Pennsylvania, and his motion proposed to make them equal. The quotas were adopted as reported.

On the 14th of September (1782) the matter of European loans came up, and he joined the majority in favor of instructing the various ministers abroad to



conform strictly to the arrangement by which the control of loans was placed in the hands of Mr. Morris; and he was with the minority on making a loan of \$5,000,000, exclusive of the loan to be made by Mr. Adams, so that it was reduced to \$4,000,000, exclusive of the Adams loan. On the 17th he voted with the majority in urging Adams, Franklin, Jay and Laurens to act as commissioners to treat for peace with Great Britain. A division was also called for on the 18th on the destruction of old Continental money, excepting a certain quota of each State, as fixed by the Act of March 18, 1780; he voted with the winning side. On the 20th it became evident that certain of the Congressmen were not satisfied with Mr. Laurens' course and wished to rescind former actions for the time being. Colonel Smith, Mr. Clymer and Mr. Atlee, against Mr. Montgomery, were on the minority side, however, and Mr. Laurens was retained. The public lands question was called up on the 25th, the main intent of the effort being to assure the States that if cessions were made by them Congress would respect all arrangements they had made, or not change them without the consent of the particular State interested. Colonel Smith was in favor of this, but the motion was lost.

On October 14 an effort was again made to promote General Moultrie, and date the promotion from September 15, 1780. Colonel Smith voted for his promotion, but against the dating of it back of the day of voting it, and this was done. On the 18th a resolution authorizing General Washington to retain or withdraw the post at Wyoming, Pennsylvania, was adopted, although Colonel Smith called for a division and voted against the motion—the only vote cast against it. His concern for the frontier led him to write the Council of Pennsylvania the same day. "Gentlemen," he writes, "By a resolution which is just now passed, General Washington is at liberty to continue or abandon the Post at Wioning, as he shall judge most for the public good, the former resolution on that subject notwithstanding—indeed the former resolution was optional with the General. But from his letter on this subject, I have good reason to believe that the Continental Troops will be withdrawn, unless a representation is made to the General of the apparently pernicious consequences of such a

measure.—I objected to any new resolution being passed at present: 1. Because it was not necessary, the former resolution leaving the matter to the discretion of the General. 2dly. Because Harmony subsisted at present between the two contending States of Pennsylvania & Connecticut, which had not been interrupted since those troops were stationed there; But if they were withdrawn, either the one party or the other might get the exclusive Possession of the Post, and then it would be easy for the Party in Possession to raise obstacles to the decision of the dispute & procrastinate it to a dangerous length, and I ventured to predict that this would be done or at least attempted, and even should it be decided notwithstanding all attempts which might be made & prevent a determination and that determination should be against the Party in Possession, I dreaded the Consequences. 3dly. That this Post was the Keystone of protection to a great extent of the frontiers of Pennsylvania, and I was so unfortunate as to be decidedly of an opinion directly the reverse of that of the General, respecting the peaceable disposition of the Indians—and may Heaven grant that the event may prove my want of judgment on this point! and that countermanding the Expedition may be followed by salutary effects!—I give the Council this information in order that, if they are of opinion there is any weight in my sentiments, they may make such representations to the General as they shall judge the good of the State may require. There is perhaps a necessity for removing the Troops there at Present, if they are so undisciplined & their conduct is so irregular & unmilitary as represented; but that operates only as a reason for their being replaced by others & not for evacuating the Post. The Council will, I hope, excuse my officiousness on this occasion, and ascribe it to my anxiety for the Peace of the frontiers.”<sup>1</sup>

On this same day, October 18, he voted with the majority to recommend separate taxation for national supplies in each State. On the 29th, Congress accepted the cession of public lands of New York, Colonel Smith voting with the majority, although he voted with the minority on the right

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<sup>1</sup> The Pennsylvania Archives, Vol. IX, p. 652. The Council at once communicated with General Washington.

of claims to be settled according to the ninth Article of Confederation, without regard to this acceptance.

He and the rest of his Pennsylvania colleagues had but a short service in the new Congress, which organized on Monday, November 4, 1782. On the next day Vermont was declared to have fulfilled her part of the requirements for admission. On the 8th he voted with the majority on methods of retaliation by the army, and this proved to be his last participation in a call of the yeas and nays. He, Mr. Clymer and Judge Wynkoop had represented their State in Congress so far, because Mr. Montgomery and Mr. Atlee were standing for the next Assembly from Lancaster, a campaign in which they were successful. They became prominent in the new Assembly, and as soon as President John Dickinson was elected and the organization fairly completed, new Congressional delegates were elected on the 12th of November, the last day on which Colonel Smith probably attended, for he was not present the next day, as was none of his colleagues.<sup>1</sup> Their successors in Congress, who presented credentials on Monday, the 18th, were Honorables Thomas Mifflin, Thomas Fitzsimmons, James Wilson, John Montgomery and Richard Peters. It will thus be seen that Pennsylvania politics had experienced a great change when these vigorous anti-Constitutionalists could be sent to Congress. And so it had, for the new financial measures had won a great many friends to the anti-Constitutional or "Republican" element, and while the Constitution itself was not, for the time being, much discussed for its own sake, it was plainly evident that now that the war was practically over and measures ripening for a signed peace, the old Constitutionalists were losing their power, and keenly realized it.

The situation, from the Republican point of view, is expressed in some rather lively irony in the supposed speech of "Mr. Bloodybones" in the Assembly, on the issue of a pamphlet by ex-President Reed.<sup>2</sup> Referring to some of the

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<sup>1</sup> In the remarkable collection of Simon Gratz, Esq., of Philadelphia, are Congressman Smith's bills for services in 1782. The first is for the period from April 21 to July 20, with "no day absent," £136 10s.; the second that for July 21 to November 12, inclusive, with three days' absence and mileage of 120 miles to Carlisle, £160 10s.

<sup>2</sup> The *Pennsylvania Gazette*, February 19, 1783.

objects of attack he says: "The Republican Society.—Auh! Mr. Speaker, what a pity we abused this body of citizens for opposing the constitution; for in so doing we have taught them, by submitting to it, to take it out of our hands. Some people say our late worthy President set them an example of this kind of conduct. \* \* \* The Directors of the Bank.—Auh! Mr. Speaker, this bank is like the smell of burnt bones in our nostrils. It was this bank that kept our army together last year, by which means the Republicans, who instituted it, have run away with all the power and popularity of the State. \* \* \* All those bigots of every religious society, who object to the sole and exclusive right of the Presbyterians to govern the State of Pennsylvania."

With this situation and these results, Honorable Thomas Smith felt that his work had been accomplished, and now that he had given so long service to the public he might retire and devote himself to the practice of his profession and the care of a home. Heretofore he had lived at Bedford—a period of over a dozen years, but that place was, in the opinion of Mrs. Smith, too far from her old home near Philadelphia, and her husband decided to at once make Carlisle their future residence.<sup>1</sup> After he reached Carlisle he wrote his friend Congressman James Wilson a very interesting and characteristic letter, which may serve as an aftermath to his own Congressional service. As Wilson was not only his friend and successor, but to Mr. Smith had fallen much of the western practice of Wilson after the latter left Carlisle, the letter has a rare confidential atmosphere. But it has a still greater value in that it bears the only known warning of a friend of that great statesman, that he—Mr. Wilson—was dallying with a speculative craze for western lands, which, had it been heeded, would have saved his great career from fear of a debtor's prison and a grave in a distant land, instead of beside his wife in Christ Church.<sup>2</sup>

"I wished, on many accounts," reads the letter,<sup>3</sup> "to

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<sup>1</sup> Letter of December 3, 1784, to his mother.

<sup>2</sup> James Wilson is buried at Edenton, N. C. The time surely has come when an adequate monument to him should be erected at the scene of his great work.

<sup>3</sup> Dated Carlisle, December 9, 1782. It is quoted through the courtesy of Thomas H. Montgomery, Esq., West Chester, Penn.

have seen you before I left the City, as I had a great deal to have said to you upon business, both public & private; but you were so assiduously engaged in sowing the spot from which you are to reap a golden Harvest, that I had no opportunity, after you was appointed to that Station, in which I could freely converse with you, without degrading my then dignity.<sup>1</sup>—Take care that Trenton don't engross too much of your attention, for I never yet knew or heard nor read of any Man who was remarkably eminent in any Science or Profession, who did not prove a Novice to his own loss, when he neglected that & betook himself to any other, unconnected with the former—the causes are obvious—he applies the same maxims and rules to both & his success in the former makes him too sanguine that he will succeed in equal degree in the other; of consequences he despises the plodding conduct of others, & thinks he has, or can easily be persuaded that he has, found out a shorter road to success.—This, you will say, may possibly be a sincere, but certainly not a very polite method of displaying friendship—this is the least you will say should you be in a good humour; but should the nefarious arts of any of the Skunks have ruffled your temper, I will come well off, if you only say 'this fellow presumes too much on his long acquaintance with me, I don't like such freedom'—well then, as soon as you have recovered your good humour and forgotten my offence, which you may perhaps do in six or twelve months, I wish you to write to me in detail respecting your business at this Place & your Papers relating to that, & also your business & Papers in Bedford & Westmoreland, as several People in the last named county have desired me to procure the Papers which they left in your hands, a list of which I have in Bedford, and for which some of them are impatient."

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sylvania, who possesses many of the papers, as well as the miniature of Judge Wilson. There are no descendants in this country.

<sup>1</sup>It will be remembered that Mr. Wilson represented some of the claims to Western lands, a subject which was in a very sensitive state in Congress. Mr. Wilson had been made the leading attorney in the Connecticut claims case, which was now on before a special court at Trenton—a place where other claims to land were tried also, so it stood, as used in this letter, for Mr. Wilson's speculation in land.



"As this of itself," he continues, "would be a long, dry, dull narrative, embellish it here & there with an Episode of Politicks, and a delectable description of the Transactions of the Skunk Association.<sup>1</sup>—Does Arundo begin to winch? I have just seen the Letter from the Member of Assembly.<sup>2</sup>—By the Style, I guess it to be the production of J. M. of last winter—there are some exceptionable paragraphs in it; but I am much pleased with it in general.—The facts are justly & well stated—the observations poignant & pertinent.—These People will not let the State enjoy a moments Peace—they resemble the fallen Spirits in Milton and what they could not regain by force, Satan will attempt by stratagem: curse on their system to divide and inflame the minds of the People, it has sunk the State below its importance in the Union, and has had the most pernicious effects on the Common Cause.—It is difficult to say whether their wickedness or their weakness has been the most conspicuous.—The good Providence of the Supreme Being is in no instance more apparent, than in that he generally deprives those whom he permits to be villains, of their senses, and in mercy to mankind & even to them recoils their villainy, & makes it the means of their punishment in this life. I don't know if this be orthodox Divinity or not—ask Dr. Weazel—I should not have introduced it, had I not observed that it is become the fashion to appear religious—Seriously the Proclamation has too much Mystical Divinity in it<sup>3</sup>—I wish it may not do the Author more hurt than good in the eyes of the most intelligent part of the community, as the Skunks will not fail to turn it to his disadvantage, and even I, were I as much his enemy as I am sincerely his friend (because I think the State will have reason to rejoice in his Administration) could excite the laugh, if not the contempt of the multitude, at his expense. The State goes out of its line, if it intermeddles with any other than the moral part of religion—your sentiments have deserved weight with him—caution him against stooping to those

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<sup>1</sup> This malodorous animal seems to have been the favorite emblem of the opposition for both sides, as it is used in Judge Bryan's son's report to his father on the political situation at a later date.

<sup>2</sup> The *Pennsylvania Gazette* of December 4, 1782.

<sup>3</sup> By President Dickinson in the *Gazette* of November 27, 1782.



arts, which he has abilities to make him superior to—to which the weakest and wickedest men are comp[et]ent, and never fail to resort. If he trusts to his own superior understanding and worth, and the support which he will by them receive from the best and ablest Men in the State, he will triumph with dignity, which I do most sincerely wish.—Whenever I begin Politicks, I am like a Horse, or perhaps you will say, an Ass, running a race, I cannot stop when I please.

“I wish for a long Letter of business from you,” he adds in a paragraph humorously descriptive of Mr. Wilson’s chief opponent at the trial at Trenton, Hon. Eliphalet Dyer, the leading counsel for Connecticut and member of Congress, “and therefore beg leave to point out the most proper time to compose it.—Suppose we then that Mr. D——r is upon the floor—has pulled up his Breeches—surveyed his Shoe-Buckles with great accuracy, and has spit first at one side and then at the other—has addressed the President and then taken another look at his Buckles—suppose that you are sitting at your ease & looking at him through your spectacles, like a Surveyor through a compass, with a good natured smile upon your countenance, so that all the House may see what excellent & white teeth you have—take a quire of paper and devote two or three hours to me, while he entertains the House with his intelligent, melodious and well arranged oration—which, by the time that you have finished the quire, he will be drawing near the conclusion of, and you will hear the recapitulation, in which a great orator never fails to bring the whole argument to a focus, and it is very probable he will, in the last sentence, inform you whether he be for or against the measure then in discussion, which your dull apprehension would not otherwise have enabled you to discover, had you listened all the time, in which you have written a long, elaborate letter.

“I promised to give the Bearer a sketch of all your characters—that of each in one Line, but in spite of myself, I took up three with the first and by the time I had got half through the House, I found half a side too little—I then left off, for which some of you will not be sorry,

although most of you might have liked a continuance well enough.<sup>1</sup>

"Will you let one of your young Gentlemen Transcribe the case in 3<sup>rd</sup> Wilson 149? I have the recital well written; but to entitle it to be read as an authority I must have the whole; besides, I do not know that the point of Law determined in the principal case is in any of the Books extended any further than Ejectments & to Ex<sup>ts</sup>.

"Do me the favour to Present my Compliments to the President & to your Colleagues: I hope General Mifflin is so far recovered as to be able to attend—the People have great expectations, founded on your abilities and integrity, and are under no apprehensions that you will veer with every gale or blast of wind. I am, with much esteem your very humble Servant

"THOMAS SMITH

"Carlisle, Dec<sup>r</sup> 9<sup>th</sup>, 1782

"P. S. 12. As the Bearer did not begin his journey at the Day he expected, I have given the Letter before alluded to a more deliberate perusal, and have discovered more & greater beauties, & fewer & less faults than appeared at the first reading. And when I consider the Person *from* whom & the Person *to* whom it is supposed to be written & on whom it is meant to operate, I think it an excellent performance and am of opinion that *if it is generally circulated among the People* it will have more influence upon their minds than if more art had *appeared* in the composition, & will eradicate the poison instilled by the Freeholder—Judge Wasp,<sup>2</sup> in Letters which I have heard he has written to The o-l-d General<sup>3</sup> &c, exults that the Proclamation<sup>4</sup> has been taken no notice of in Philada, & that no addresses have been presented nor talked of in consequence of it."

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<sup>1</sup> This sketch has unfortunately not been preserved, so far as is known.

<sup>2</sup> Probably Judge Bryan.

<sup>3</sup> Probably intended to represent a drawl.

<sup>4</sup> By President Dickinson. There never was a time when *rabies scribendi* was more prevalent in Philadelphia than at this time. The papers were filled with anonymous articles, many of which were able and some hilariously pungent. They were both local and national. Wilson was said to be among the writers.

With this aftermath, leave may be taken of Mr. Smith's long and useful Congressional service and public life. He had left his private duties for public ones, in the time of need; now he would lay down the latter and take up the broken threads of his profession for the rest of his life, so far as he then knew. "Soon after my last Letter," said he, in speaking of this period in the letter to his mother two years later,<sup>1</sup> "the War commenced between the two countries, which ended in their Separation and the Independence of America—altho' I was in Possession of Profitable offices under the Government, yet I took a decided part in favour of the Land I live in—I was early chosen Colonel of a Regiment of Militia—then was chosen a Member of our Assembly under the old Government—then a Member of the Convention which framed the New Government—twice a Member of Assembly under the new Government & lastly, a Member of Congress—these offices were more honourable than profitable to me, nor was my Pride, Vanity or Ambition gratified by them—I did not seek but I could not shun any of them—it is a pleasing reflection to me that I gave general satisfaction in them all, which was as much beyond my expectation as my merit—many have I known who possess far superior abilities and yet have failed—I have been for these two years returned to private life (so far as my Profession can be called private) and it will be contrary to my inclination, if I am ever appointed to a public Station again—the highest public offices have no charm for me—if there are honours attending them I have had my share—if burthens, I have borne my part<sup>2</sup>—my choice is a private Station, in which I can more warmly feel & better express that great gratitude which I owe to that beneficent Being, the Supreme Governor of the universe, who has made all my undertakings to Prosper & has enabled me to perform the duties to which I have been called."

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<sup>1</sup> Letter of December 3, 1784, before mentioned.

<sup>2</sup> In another part of this letter he says: "During the War I was constantly in one public station or another, and had not leisure to attend to my private business."

## IX

### A LEADING LAND LAWYER OF PENNSYLVANIA

1783

When the Honorable Thomas Smith retired from Congress in November, 1782, he resumed a practice which had already covered over ten years. Notwithstanding the distractions and irregularities of war, his personal docket of cases at Bedford alone shows him to have had within two of two hundred cases from the January term, 1772, to and including the April term of 1782.<sup>1</sup> There is some evidence, also, that the docket omits some cases during the period of greatest disturbance in Bedford, for, while it gives him no cases in 1777, the court docket gives him three at the October term;<sup>2</sup> so that he had over two hundred cases in the Common Pleas Court at Bedford alone. He apparently had but two cases in 1772, and in 1773, when he became Prothonotary, had but three. During the rest of the time he held that office he had but six cases in '74, six in '75 and three in '76, according to his personal docket. He gives himself no cases in '77, while the contest for the Prothonotary's records was being made by Robert Galbraith, and in '78 records but eight cases. The next year, however, the record is kept more carefully and detailed, and indicates thirty-one suits. This is more than doubled in 1780, when they reach sixty-six, while the following year shows fifty-six, and the first two terms of '82 show seventeen.

When he began in January, 1772, there had apparently been but ten attorneys admitted since the organization of Bedford court, April 16, 1771. These were Robert Magaw,

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<sup>1</sup> Thomas Smith's "Bedford Docket to 1782," in the possession of C. P. Humrich, Esq., Carlisle, Pa.

<sup>2</sup> Common Pleas Continuance Docket at Bedford, Pa. This office apparently kept only the continuance docket; it is well known some kept but one.

Andrew Ross, Robert Galbraith, Phillip Pendleton, David Sample, James Wilson, David Grier, David Espy, George Brent and James Berwick.<sup>1</sup> Of these Galbraith and Wilson had the most of the practice. At the January term, 1772, Mr. Smith appears in No. 10, his first case, with Wilson, against Sample and Galbraith. At the April term Wilson, Hamilton and Smith appear against Galbraith and Berwick, and there was a case in which Attorneys Espy, Galbraith, Woods and Hamilton had Wilson, Smith, Duncan and Riddle as antagonists. According to the court docket, he was associated with Wilson in a suit at the July term, although his personal docket makes no note of this. Cases like these raise the query whether or not "Smith" might not mean Colonel James Smith of York or Carlisle, but as the record does not distinguish, and as Thomas Smith is always indicated in this way in cases known to be his, one must incline to the belief, as has been suggested, that the personal docket was not fully kept, and may have included only cases of long continuance. At the October term of '72 he appeared in an ejectment case with Espy, against Sample, and another in which Espy was pitted against Smith, Wilson and Galbraith. There were two other cases of that kind that term.

In 1773, when he became Prothonotary, he began with a case in the January term, in which he was with Wilson and Espy, against Galbraith, Ross, Magaw and George Woods. At the July term, before Judges Dougherty, St. Clair, Proctor and associates, he was in two cases, and at the October term in one with Wilson. These indicate the men before and with whom he practiced in these earlier years at the Bedford Common Pleas Court. So far as Bedford is concerned, he seems to have been too busy for much practice in '74, '75 and '76, and there was little done in '77, although, of the four cases at the October term, he was engaged in three.

On April 14, 1778, however, after the Prothonotary difficulty was settled and he, David Sample, George Brent, Samuel Irwin, George Woods and David Espy were readmitted under the test oath, there were twenty-eight cases brought up, in just half of which he was engaged

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<sup>1</sup> Bedford Common Pleas Docket, No. 1, back part.



either alone or with other counsel for either the plaintiff or defense. At the July term he had twenty-three out of the thirty-seven cases, and he was easily the leading attorney from that time on in this court at Bedford. For example, at the April term, 1779,<sup>1</sup> of eighteen cases before the court, he was engaged in all but one, no other lawyer making any approach to equality of practice, although Woods and Galbraith had more than any other attorneys. At the July term he was in every one of the twenty-five cases, while at the autumn session he had fourteen out of twenty-two.

The year 1880 showed similar result. Of fourteen suits at the January term, twelve engaged his services, and seventeen out of twenty at the April session, a record exactly duplicated, also, at the summer meeting. The October term had eighteen cases, of which he had eleven, a reduction due, no doubt, to his election to Congress in November. He did not give up his practice entirely even then, however, for, like Robert Morris, he probably refused to break private engagements, when it was not absolutely necessary for the public service, as it was not in his case. The continuous sessions of Congress, however, made it necessary for members to relieve one another, and no member for Pennsylvania was present a greater proportion of his time than the one from Bedford.

In 1881, while he was in Congress, his friend, Mr. Woods, took the larger share of the practice, but even then he had forty-three of seventy-four cases up during the year. The proportion was still smaller in his next and last year in Congress, Mr. Woods taking most of the one hundred and fourteen cases, Mr. Smith reserving but thirty-four for the entire year. This brings his practice, up to the date of his settlement in Carlisle, late in November, 1782, so far only as concerns the Court of Common Pleas of Bedford county, the most elementary and simple court of that county before which he practiced. As has been indicated before, it was a bench made up of laymen, of a high character, to be sure, but still laymen, the old Justices

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<sup>1</sup> From this date onward until the July term of 1791 the analysis is made from an exact transcript of the dockets made at the request of the writer by E. H. Blackburn, Esq., the present Prothonotary of Bedford.



of the Peace or "Squires" of the various settlements of the county.

Bedford county Common Pleas was not the only Common Pleas tribunal in which he was an advocate or counsel. It has been seen that he was admitted at York as early as 1774, and his own words tell of his membership of the bar of Westmoreland as early as April of the same year, and he appears there at the April term in 1781, making the motion for the admission of Hugh Henry Brackenridge.<sup>1</sup> The next year, after the Washington county Court of Common Pleas was organized, he was admitted there, also.<sup>2</sup> The only remaining county in that region was Cumberland, where the first record of practice in the Common Pleas was at the July term of 1779, where "T. Smith" was associated with "Noarth" or George North, who was admitted at that term.<sup>3</sup> Mr. Smith was admitted there in April, 1778. At the October term he appeared, also, as counsel for his brother, Dr. William Smith, and in 1781 "Th. Smith" appears at the April term and "Thos. Smith" and Hamilton are pitted against Jasper Yeates at the October term. In January, 1782, he is curiously recorded as "Smith, Jr.," for the plaintiff, opposing Mr. Yeates again. This is to distinguish him from the much older Major James Smith, who had long been known as a man, soldier, statesman and lawyer throughout Pennsylvania.

Whether he practiced in other local Courts of Common Pleas in central Pennsylvania does not appear. Such lists of admissions as are accessible for Lancaster county do

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<sup>1</sup> Albert's History of Westmoreland County, p 330. Mr. Albert could find no record of admissions back of January 5, 1779. Apparently Mr. Smith did not seek admission in Lancaster, for his name does not appear in Leaman's list of admissions in Ellis and Evans' History of Lancaster County, p. 245.

<sup>2</sup> He was the first one admitted at the January term, 1782, and fourth since organization of the courts, Brackenridge being the first. Crumrine's "Bench and Bar of Washington County," p. 263. Justice Coulter, so late as 1836, at Greensburg, while speaking of the year 1782, said: "Thomas Smith, Esq., afterward one of the Judges of the Supreme Court, brought quarterly from the East the most abstruse learning of the profession to puzzle the backwoods lawyers."

<sup>3</sup> Franklin was a part of Cumberland until September 9, 1784, when it was organized, but the destruction of its early records in the fire of 1864 makes it impossible to treat of his work either as lawyer or Judge in that county.

not indicate that he was admitted there at all, at least for this court. It is perfectly natural that his visits to Philadelphia should make practice there feasible, and Mr. Martin's list shows his admission to have been as early as the September term, 1777, with a probable readmission on November 16, 1786. It is known, also, that he was admitted in other county courts, but these examples are sufficient to illustrate the extent of the main part of this local Common Pleas practice previous to his settlement in Carlisle late in November, 1782.

That Thomas Smith had a general practice is, of course, true, but it was so largely dominated by civil cases, and especially those in relation to land and other real property, that other branches of it are a comparatively negligible quantity. He was preëminently a land lawyer. His knowledge of land titles and precedents, growing out of his life as a surveyor, in a region and at a time when settlements on and transfers of land were so common, made his services in especial demand in that line. Consequently, when his cases grew more important than the old Justices' Common Pleas could ordinarily settle, they were taken to higher courts.

As every lawyer knows, higher causes than could be handled by the old Justices' Common Pleas were tried under special commission or regular sessions of the Supreme Court ever since the act of 1722, an act that closed the old-time judiciary contest in which the then Chief Justice David Lloyd gave form to the judiciary system of the Province. There was no material change in the system for nearly a half century—forty-five years, to be exact. As settlement began to increase, however, inhabitants to the west and north began to find trips to Philadelphia a burden, and this, with the organization of new counties, led to a demand, such as has been seen in recent years for a Superior Court, for relief courts. This culminated in the act of May 20, 1767, passed the year before Thomas Smith left London, and entitled "An Act to Amend the Act intituled An Act for Establishing Courts of Judicature within this Province."<sup>1</sup> This provided that Judges of the Supreme Court should hold stated Circuit Courts twice a year in

<sup>1</sup> Galloway's "Acts of Assembly," 1775, Chapter XIII, p. 338.

each county, and courts at times accommodated to the special needs of each county, called *Nisi Prius*—both of which were purely relief courts to meet needs caused by the Justices' Courts being unlearned in the law and the physical limitation of a Supreme Court of only three members, or four, at most.

The courts of *Nisi Prius*, as they were called, were of English origin, and grew out of similar needs in Great Britain. A summons was always issued for the Westminster bench in civil cases of a certain character, among which may be mentioned ejectments, trespass, etc., with the provision *nisi prius*, or "unless before" tried, when Judges came to the local seat of justice. This provision, expressed in the Latin phrase *nisi prius*, gave not only name to these relief courts, but also to the character of practice which naturally grew up in them. By virtue of the accommodative character of these courts, they became favorites with the people, and when Thomas Smith began practice in 1772, they were the chief courts into which a practice like his naturally gravitated. These courts were preserved by the Constitution of '76<sup>1</sup> and the act of January 28, 1777, to revise and put in force late laws of the Province, and they were not changed until long after he ceased to appear before the bar. The records of these courts were kept by the court and carried with them to the old State House, where, unfortunately, they for the most part long since disappeared.<sup>2</sup> So that, although we know that far the greater part of Mr. Smith's practice was long in these courts, we are almost entirely without the court records in which it might be analyzed, although there are some interesting résumés left by Mr. Smith himself, some time after he settled in Carlisle, in 1782.

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<sup>1</sup> Section 26, Constitution of Pennsylvania of 1776, McKean's "Acts of General Assembly, 1782," p. 17; also Chapter II, p. 4, Section 4 of Act of January 28, 1777, entitled "An Act to Revise and Put in Force such and so much of the late Laws of the Province," etc.

<sup>2</sup> A few of these *Nisi Prius* records of the work over the State were saved from destruction by members of the Genealogical Society of Pennsylvania, when the courts were removed from the State House, and carefully preserved at the rooms of the Pennsylvania Historical Society. The earliest paper of a case by Mr. Smith is one tried in April, 1782, but they are few and fragmentary. The writer knows of no records of this period in the Prothonotary's office of the Supreme Court at Philadelphia.

Of his practice in the regular sessions of the Supreme and Circuit Courts under the administration of Chief Justice Allen before the April term, 1774, when Chief Justice Benjamin Chew and Justices John Laurence, Thomas Willing and John Morton began their brief service on that bench, or under that of Chief Justice Thomas McKean and Justices William Augustus Atlee and John Evans, which began with the September term, 1778, there is much the same difficulty, with the added disadvantage of the records, as a rule, not distinguishing between the individuals who bore his not uncommon name, Smith. It is probable, however, that there was not a great deal outside of the *Nisi Prius* sessions of the Supreme Court before November, 1782, when he made his home in the Cumberland Valley.

When Mr. and Mrs. Smith decided on Carlisle, instead of Bedford, as their future residence, they had, for one of the features of their new home, a baby girl, born on August 21 of that year, 1782, and named by Mrs. Smith, in honor of her husband's mother, Elizabeth, although throughout life the daughter omitted the last syllable of the name.<sup>1</sup> Carlisle, which had long been a peculiarly important and cultivated place, welcomed the new family of the ex-Congressman. The beautiful valley, hemmed in on either side by low mountain ranges, had attracted the attention of the old French-Swiss trader and interpreter, Le Tort, a half century before. Next to York and Shippensburg it was the oldest settlement west of the Susquehanna river. It was laid out in 1751, soon after the creation of the county, and at once became a military post of great

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<sup>1</sup> Eliza Smith, when the years of womanhood came, married the son of Hon. Noble Wymberly Jones, of Savannah, Georgia, Dr. George Jones. Dr. Jones was himself prominent in Georgia political life, and served as both Judge of the Superior Court for the Eastern Circuit of that State and as United States Senator. His own son, George Wymberly, a man of scholarly tastes, whose love for beautiful editions of books led to his operating a private plant on his estate, with such results that the "Wormsloe editions" are well known to rare book lovers, educated his family in France after the Civil War, and added to his name a French modification of his grandmother's name, Van Deren, and became known as G. W. J. De Renne. Mr. De Renne's son, Wymberly Jones De Renne, Esq., who has probably the best historical collection on Georgia yet made, lives at the old estate of Wormsloe, at Savannah, which has been in the family since the first ancestor, who came over with Oglethorpe.



COURT HOUSE AT  
CARLISLE,  
in which  
Thomas Smith practiced  
and sat as Judge.  
Half-tone from cut in  
Day's Historical  
Collections





strategic value—and it has remained a favorite with the military element ever since. The old High street, or Main street, with a central quartered public square, dominated the rectangular arrangement of the town. The old court house, except a part of the cupola and clock, had been built on the southwest quarter of the public square, about two years before Mr. Smith left London.<sup>1</sup> It faced the public market on the southeast quarter, while on the remaining quarters were, respectively, the Presbyterian Church on the northwest and the Episcopal Church on the northeast, with the latter of which, no doubt, the Smiths were identified.<sup>2</sup> It is not known where either his home or his office was located, although because masses of his old papers were found in the basement of 18 West High street, a few doors west of the court house, it is believed that was the site of his office and possibly of his home, also.<sup>3</sup> Of course, it was a small place, for although it had been incorporated on April 13, a few months before he settled there, it was estimated at only about 1,500 people over a decade later.<sup>4</sup>

Before he had been a resident of Carlisle a year a project, which had long been under consideration, came to fruition, namely, to establish a college in the mountain region. Dr. Benjamin Rush and President John Dickinson of the Council seem to have been most active in its establishment.<sup>5</sup> Mr. Smith became one of its first trustees, and their first meeting was held at the home of President Dickinson, in Philadelphia, on the 15th of September, 1783, one week after the charter was secured. The institution was named in honor of the President of the

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<sup>1</sup> The cupola and clock were not added until the year of Mr. Smith's death, so that the picture here given from Day's Historical Collections, p. 264, represents the building Mr. Smith knew with these slight exceptions. As will be seen, its door was on the side, facing east, and the structure stood full out to the corner of High and Hanover streets. Judge Edward W. Biddle, who has made a study of the matter, says the Hanover street, or east frontage was 68 feet, with a depth of 44 feet—a curved projection on the rear adding 22 feet to this.

<sup>2</sup> The church has no records of that period.

<sup>3</sup> The papers were found by C. P. Humrich, Esq., Carlisle.

<sup>4</sup> Bellman's sketch of the borough, published in 1886, in "The History of Cumberland and Adams Counties."

<sup>5</sup> A sketch of Dickinson College, Carlisle, Pa., by Charles F. Himes, Ph.D., 1879, p. 15.

State—who also became President of the institution—Dickinson College. Among others of the forty trustees were James Wilson, Dr. Rush, Rev. Dr. Henry E. Muhlenberg, Thomas Hartley and William Bingham. It was April 6, 1784, before they met at Carlisle and organized the faculty, electing as head of the institution Rev. Charles Nisbet, D.D., of Montrose, Scotland, whom Dr. Witherspoon had recommended to Dr. Rush fifteen years before for the College of New Jersey, now Princeton University, before Dr. Witherspoon himself accepted the Presidency of the latter institution. The college was opened in a small two-story brick structure with four rooms, near the corner of Bedford street and Liberty alley, and so continued for nearly twenty years, or long after Mr. Smith left Carlisle as a home.

“We expect that Dr. Nesbit of Montrose will sail for this Country in the Spring,” said Mr. Smith late that year in a letter to his cousin, Dr. Peter Smith, at Slains Castle,<sup>1</sup> “as he is appointed Principal of a College lately established in the town in which I reside:—from the excellent character which I have heard of that Gentleman, it will give me much Pleasure if he will accept the invitation. It appears by a long Letter recently written by him, which I read last week, that he is a very sensible Man, acquainted with Men and Manners. The Letter I allude to is a private one to his correspondents—there is a number of Questions respecting the College: Had I the Pleasure of being acquainted with the Dr. I should think it incumbent on me to give him the most explicit answer to every Question & a very minute state of all matters respecting this infant seminary.—I take it for granted his correspondent will do this—I wish that all things may be to his satisfaction, for, much as I wish him to come over, it would give me great pain, if he should leave his native Country at his Time of life, & be disappointed in his views & expectations in this.—If you are acquainted with Dr. Nesbit, & if he should sail in the Spring I hope you will oblige me with a Packet from my Mother & all my friends, by him.”

After six years of struggle for the institution, Dr. Ben-

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<sup>1</sup> Letter of December 3, 1784, among the De Renne Papers.

jamin Rush, his family physician, writes Mr. Smith a letter which, while suggesting the various difficulties, pays an unmistakable tribute to the latter's services for the young college.<sup>1</sup> "Your zeal in behalf of our College," he writes, "has *long ago*, and *often*, excited my warmest regard. Your last letter is a recent proof of your friendship for our mutual charge. I have devoted myself to the business you have committed to me—but I am sorry to say that hitherto my prospects of success are not very encouraging. The College of Philad<sup>a</sup> have lately presented a petition to the Assembly similar to ours, praying for funds. This event has a favorable aspect upon our Application, for it will probably bring about a Union of the city & country interests in the Assembly in favor of both institutions.

"The principal difficulty in the way of *our* success," he continues, "arises from prejudices entertained against Dr. Nisbett. His Conversation & letters are so very illiberal & so public against the College—the town of Carlisle—and every thing that is *American*, that the very name of the College is unpopular with many people upon his account. I would have excused his neglect of me in his late Visit to Philad<sup>a</sup> had it not encreased established prejudices against him,—for no one in our city believes him when he accuses me of the want of friendship to him or to the College. It would be happy for his character as a moral & religious man, if he stopped with this Charge against me. But he has made others against me which are equally *false* & malicious. Poor man! I pity him—and wish him—as the best means of promoting his own happiness, and the honor of the College—a more *Christian Spirit*.

"Be assured," he adds in closing, "I shall not be idle during the remaining part of the session of the Assembly. The same views which I had in 1782 of the importance of a seminary of learning at Carlisle still continue to actuate me—and however much I have suffered, or may suffer, from my attachment to it, I hope I shall never exhaust my zeal in promoting its interests. I knew too much of the human heart before I embarked in its service to be

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<sup>1</sup> Letter from Dr. Benjamin Rush to "Thomas Smith, Esq., at Carlisle," dated Philadelphia, February 26, 1790.

disappointed or offended by the persecutions of Dr. Ewing of Dr. Nisbett. Neither of them can now move me."<sup>1</sup>

Mr. Smith remained a trustee of Dickinson College all his life, and during this decade or more of residence in Carlisle he was especially devoted to its interests. He was influential, too, for by this time he was recognized not only as Wilson's successor in central and western Pennsylvania, but as the leading land lawyer of the State. A glance at his work in the Common Pleas Courts of Carlisle and Bedford alone will serve as an introduction to his own statement at the close of 1784, after two years' work following his settlement at Carlisle. Although he was but thirty-eight years old, he was so much younger than Major James Smith of the Carlisle bar that he is, after the first year, generally spoken of in the records as "Smith, Jr.," and the elder attorney as "J. Smith." He began to have a very large practice as the year 1783 passed. It is interesting to note, too, that during this year the Carlisle court made the rule that applicants for admission must be of age, have had three full years as a clerk in a law office, and be examined in detail by two gentlemen appointed by the court. If one began study, however, after he was of age, two years of clerkship would suffice. This was in the days when the office was the law school, and Colonel Thomas Smith's office was one of them. Among his ablest rivals at this bar, in amount of practice, were Hamilton, Duncan, Yeates, Magaw, Steel, A. Wilson, Hartley, Chambers and Major James Smith. At the October term, 1783, he had a case in which he was pitted against Major Smith.<sup>2</sup> During 1784 his practice

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<sup>1</sup>The College of Philadelphia had been restored to its former estate, with Dr. William Smith as Provost again, and it now stood as a rival to the new University which had attempted to supplant it, and which formally united with it the year after this letter was written. Dr. John Ewing was Provost of the University at this time, and became the head of the united institutions about two years after the restoring act. So Dr. Smith had a victory, but a very short enjoyment of his restored Provostship. The restoring act was passed March 6, 1789. Dr. Nisbet remained President of Dickinson College until his death in 1804.

<sup>2</sup>It is amusing to note the slips in the record, occasionally, in the way the Prothonotary indicates his part in a case. It is "Thomas Junr." in one case, "T. Sm." in another, "T. Smith Jr.," in a third and "Sm. Junr." in a fourth. In a case at the January term, 1784,

grew tremendously, and he soon succeeded to that of Steel, as he had that of Wilson and Stevenson.<sup>1</sup>

His Bedford office showed almost equal results in the Common Pleas Court, where Woods had the greater practice, on account of Mr. Smith's non-residence, no doubt; but, while Woods had a greater practice than any one else, Mr. Smith was the only one who approached him in number of cases. In 1783, at the January term, he had thirteen out of the thirty-eight cases considered, and twenty-five out of sixty-three at the April term. The July term showed twenty-four out of fifty-six, and that beginning in October, twenty out of thirty-six. The year 1784 showed much the same relations between the various amounts of practice of the different attorneys in this court. There were one hundred and ninety-two cases during the year, and of these Mr. Smith had seventy-four, or nearly forty per cent.<sup>2</sup>

Of course, these two courts were a small part of his practice, and not even all in these two counties, not to speak of the various other counties and their various courts, or the Supreme Court *in banc* at Philadelphia. "During the war," he wrote, December 3, 1784, in the first letter to his mother since the opening of the Revolution, "I was constantly in one public station or another & had not leisure to attend to my private business—I now pay the most unremitted attention to it—I attend more Courts than any other Lawyer in Pennsylvania—during the last 12 months I have pleaded no less than 33 weeks & have travelled above 4000 miles on Horseback; but this is too severe on me & obliges me to be too absent from my family—I must, as soon as I can, contract my business, for I do not covet Riches—I should not have attended so

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"Smith Jr." is plainly stated to be "Thomas Smith, Esq." See Docket covering these years for that court at Carlisle.

<sup>1</sup> After James Wilson left in 1779, Steel and Stevenson had the greater part of the practice, but Mr. Smith soon succeeded to that of them all very largely.

<sup>2</sup> This year witnessed the first meeting of the Council of Censors, which began in November, 1783, and extended its work to late in 1784. Judge Bryan was the leader of the radical element, which controlled, and St. Clair, Wayne and others led the minority. "The Journal of the Council of Censors" is one of the most interesting volumes with which a student of Pennsylvania constitutions and politics can become acquainted.



many Courts; but when I married I was obliged to remove from the County in which I had till then dwelt, as my wife did not chuse to go so far from her Parents<sup>1</sup>—therefore as I was engaged in business there I was obliged to attend to that & also to the business in which I became soon engaged in the County in which I now dwell. I have three young gentlemen studying the Law with me, one of whom is the third Son of my Brother & Benefactor William—I trust I have it in my power to return some small part of the great obligation I am under to the Father, through the Son—you may know his age, for he was not born till three years after I left Scotland, yet he is three inches higher than I am—he possesses a very fine genius & a judgment far above his years—he is a fine Public Speaker & if his life and health are preserved, he bids very fair to be an ornament to the Profession for which he is intended: to prepare him to be a great &, what is more, a good Man, no pains shall be spared on my part—indeed I ascribe much of the Success which I have had in the world (under Providence) to those principles of truth & integrity early instilled into me by the example of his Uncle Charles, while I lived with him in London—a better Man than Charles never lived—this young gentleman is named after him & I trust will imitate his virtues.<sup>2</sup> \* \* \* I omitted to inform you in the

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<sup>1</sup> This statement would seem to lend additional probability that he did not come to America much before his location at Bedford in 1769.

<sup>2</sup> Hon. Charles Smith, LL.D., was born at Philadelphia, March 4, 1765, and was the favorite son of Dr. William Smith, by whom he was educated. He graduated from Washington College, Maryland, in May, 1783, and after a brief study under his brother, William Moore Smith, at Easton, finished his studies with his Uncle Thomas at Carlisle. He was admitted to the bar in Philadelphia in 1786 and in Lancaster in 1787, after which he settled in Northumberland county, and was sent with Simon Snyder, afterward Governor, to the Constitutional Convention of 1789-'91 of Pennsylvania. He was a leader in the convention, and at the summer recess of 1790 took measures for inaugurating the first law school in the State as a department of the College of Philadelphia. The newly adopted Constitution of the United States needed exposition and defense in the college of the metropolis and capital at this time, and instead of a law school, a committee of the trustees, composed of Messrs. Shippen and Hare and Justice James Wilson, of the Supreme Court of the United States, proposed a plan for law lectures. These were given by Justice Wilson himself, and they ceased after a couple of seasons when their purpose was accomplished. Charles Smith



proper Place, that the Lands & other Estates of which I am possessed would sell for about four thousand guineas; but Money is very scarce in this Country & were I obliged to sell it, I could not get half the Money for it in any reasonable time."<sup>1</sup>

In the same letter, after referring to his wife in the glowing terms quoted elsewhere, he says: "She has blessed me with two Daughters & my beloved wife has given your name to the eldest—the other she has called Mary<sup>2</sup>—I was in raptures with my dear wife when she shewed that affection for you in giving your name to her first born, but she is uniformly good in every instance. \* \* \* My beloved wife requests me to present her Duty & Affection to you—your namesake is prattling about me & the young one is laughing on her Mother's Knee."

A few days after this domestic picture was written, Mr. Smith set out for Washington, Pennsylvania, to try a suit at the December term (1784), in which he had more pride, probably, than in any other case in his long practice. On the 21st of the very month of September, 1767, when Thomas wrote a letter to his mother from London, a

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settled in Lancaster, where he married the daughter of Justice Jasper Yeates, of the Supreme Court of Pennsylvania. He was with the staff of the army at the Whiskey Rebellion of 1794, in 1805 became a member of the American Philosophical Society, and in 1806 began a three years' service in the Legislature as Representative. In 1810 Governor Snyder appointed him to edit the Laws of Pennsylvania, the scholarly work since known as "Smith's Laws." He became State Senator in 1816 and in 1819 became President Judge of the Ninth District, a position he resigned in 1820 to become President Judge of the newly created District Court of the city and county of Lancaster, which he held until it was abolished. He was made Doctor of Laws by the University of Pennsylvania, the fourth to receive the degree after Marshall and first before Kent. He was suggested for the Supreme Bench of Pennsylvania in 1817 and edited Yeates' Reports. He died in Philadelphia in 1836. [The writer is indebted for permission to use part of these notes to Hon. Hampton L. Carson, Attorney-General of Pennsylvania, for whom he prepared them in 1899.]

<sup>1</sup> About \$21,000, on the basis of 25 cents to the shilling, a guinea being 21 shillings.

<sup>2</sup> "Maria," as the fly-leaf from the family Bible among the De Renne Papers has it, was born May 10, 1784. She became the wife of Frederick Campbell Stuart, Esq., of Virginia, and at his death the possession of his Scottish estates was contested by relatives abroad in a noted suit before the House of Lords. She was successful, however.

young Virginian, George Washington, who had been impressed by the lands southward of Fort Pitt, wrote Captain William Crawford, at Stewart's Crossing, on the Youghiogony river, to pick him out a nice tract of land of between 1,500 and 2,000 acres in his neighborhood. As George Croghan claimed nearly everything in sight, Captain Crawford went very quietly about the matter, and after the purchase of 1768 from the Indians, took out warrants for four tracts, which passed to Washington February 28, 1782.<sup>1</sup> Soon after the warrants were taken out, namely, in 1770, Washington visited the region now Washington county and directed Crawford to get him more land in that quarter. Soon after he secured suitable lands on Chartiers creek and Miller's run, and Croghan, on learning it, claimed the land and urged settlers to locate upon it. In 1774, when the Virginia claims were causing so much trouble in that section, Captain Crawford advised Washington to take out a patent for his lands, from the Virginia government also, which he did on July 5, 1775, as part of the territory of Augusta county. The settlers were warned off in 1776 and again in 1779, but in vain. After the Revolution, General Washington, in September, 1784, visited his lands and kept a journal of the trip. A county had been organized there after the general settlement of the Virginia claims in favor of Pennsylvania, and named in his honor.

By September 21 he had satisfied himself that legal measures must be taken at once to secure possession from the "squatters." On the next day he set out for what is now Uniontown, Pa., "in order to meet with and engage Mr. Tho<sup>s</sup> Smith to bring Ejectments & to prosecute my suit for the Land in Washington County."<sup>2</sup> The settlers secured Hugh H. Brackenridge as counsel.

What the interview between General Washington and Mr. Smith may have been is not known. The latter made some notes of the case:

"Brief of General Washington's Land on Millers Run:"  
"23 March 1771 Col. W<sup>m</sup>. Crawford Surveyed 2813<sup>a</sup> on

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<sup>1</sup> Crumrine's History of Washington county, Pa., 1882, p. 856.

<sup>2</sup> Baker's "Washington After the Revolution," 1898, p. 15, from Washington's diary of that trip, preserved in the State Department at Washington, D. C.

Millers Run for George Washington—the right not mentioned.

“14 October 1770 John Posey entered into a Bond to Genl. Washington conditioned to convey his right to 3000<sup>a</sup>—under the Proclamation of 1763.

“1774 A Patent for 2813<sup>a</sup>—the above Survey granted to G. Washington but as the Copy of the Survey Returned to the office by Lewis the County Surveyor, & on which the Patent Issued, is not obtained, the Date of it does not yet appear.

“Col. Crawford made Improvements on the Land for General Washington before the adverse Parties claimed (but what those Improvements were does not appear)—1 May 1772. Col. Crawford found six Men on the Land who had built a House & cleared 2 or 3<sup>a</sup>—he paid them £5 for their Improvement, & built 4 Cabbins viz one on each corner of the Land,” etc.

This is sufficient to indicate that it would be necessary for General Washington to go back to Virginia and forward all the proofs possible to collect. Meanwhile, the preliminary entry of the case was made at the December term, 1784, as “Lessee of George Washington, Esq., vs. Timothy Turnout, with notice to” thirteen settlers.<sup>1</sup> The notice was successfully served at once on all but one, who happened to be away. General Washington, at home, was working hard to gather all the proofs necessary, the records from the Virginia Land Office, copy of the agreement between Pennsylvania and Virginia, proclamations in 1774, and the like, and a long, carefully written letter detailing the facts. It was July 14, 1785, before he sent what he had gathered, “a necessary one, viz., the British King’s Proclamation, properly authenticated, forbidding the settling of the Western Lands—in defiance of which the Defendants took possession of my Land, which was surveyed for Military services, is not yet come to hand; but shall be sent as soon as it does.” He thought the weak point of his case might be the meager extent of his

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<sup>1</sup> Previous to 1806 fictitious names, such as Timothy Turnout, John Goodright, et al., were used in testing title to real estate. The papers in this case were found in the basement of an old building at 18 High street, Carlisle, Pa., believed to have been the site of Mr. Smith’s office then. They are now in the possession of C. P. Humrich, Esq., of that place.

improvements. He also indicates that, as Mr. Smith had evidently informed him that James Wilson had expressed a willingness to serve on the case, that it wasn't necessary, and that Smith, not Wilson, as has been thought, was his first choice. "I feel myself under great obligation to Mr. Wilson," he writes, "for his readiness to serve me in this suit, because I am satisfied motives of friendship, more than those of interest, were his inducements. His attendance on Congress must now render this impracticable, if it were ever so necessary; but to me, the case seems so clear & self-evident, that I think nothing more is necessary than to state facts. However, as you understand the decision of your Courts better than I do, I leave it wholly to you to call in assistance, or not, and from whom you please."

Notwithstanding all this assurance of the self-evidence of the case however, he adds: "To ease you as much as I am able of this, I have, in a paper enclosed, put down the foundations, and evidence in support of my title, under all circumstances, as they have occurred to me.—As also the pleas which *I suppose* will be urged in behalf of my opponents, in opposition thereto." These two statements are of especial interest as being the only known legal argument ever prepared by Washington.<sup>1</sup> "The ground on which the title of G: Washington to the 2813 acres of Land in Washington county, State of Pennsylvania, is founded; with the evidence in support thereof," covers eight foolscap pages, each page arranged in two columns, the first showing the "Ground" and the second the "Evidence." These are followed by five pages, arranged in similar manner, devoted to "The ground, on which it is presumed the Defendants will place their Defense," showing the "Pleas" in one column and the "Answers" in the other. The General was not content with this, even, for on September 10 he wrote Mr. Smith further reflections on the delayed Proclamation, which had been sent before he mailed his former packet. In this, also, he says he has heard that the intruders were going to leave. What it meant he did not know, but whatever it meant, since they had had his land for ten or twelve years and caused him

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<sup>1</sup> A photographic reproduction of the first page is here given.

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The ground on which the title of G. Washington to the 2813 acres of land in Washington County, State of Pennsylvania is founded; with the evidence in support thereof.

### Ground.

### Evidence

1. Col. Crawford as an acquaintance and friend - and one who had a military claim under the Proclamation of 1763 which he was desirous of securing. - proposed to be at the trouble of looking out the land, while G.W. was to use his endeavours to obtain the Warrants. - accordingly the tract of 2813 acres which is now the subject of dispute was explored, and allotted for the use of G.W. and every measure which could be taken at that early period was adopted to secure it. -

1. The latter's recollection and those already in the hands of Mr. Smith are declaratory of this. -

2. - At the request of G.W. and subsequent to that of Crawford by the Masters of William & Mary College by whom surveyors were appointed, for the purpose of surveying the 20000 acres of land granted to the first Virginia Regiment as a bounty under the Proclamation of 1763, and previous to the execution of the deed he made an actual survey.

2. - This survey was left among other papers in the hands of Mr. Smith - or with Mr. The Treasurer of the County of Fayette who does business for G.W. The latter not being it, he has the recollection to have been possessed of it when he was in the Western Country.





great annoyance and expense, "It is my wish & desire," he adds, "whether they leave the Land voluntarily, or are compelled to do so by a course of Law, that you should sue them respectively for Trespasses, Rents or otherwise, as you shall judge best, & most proper to obtain justice for me."

The reply to this is so interesting and characteristic of Mr. Smith that it is given entire. Not many men have been either courageous or wise enough, or had the opportunity, to counsel moderation and mercy to this revered American commander. "When the letter which you did me the honour to write to me on the 14<sup>th</sup> of July last, was brought to Carlisle," he writes on November 17, 1785, to General Washington at Mt. Vernon, "I was in Philadelphia, & did not receive it till my return in August.<sup>1</sup> I could not answer it before my return from the western Courts, because I had left your papers at Bedford (where I leave all my papers respecting my Business in the western Courts, which are not necessary to be brought to this place)—they were locked up in a private drawer of mine, and, as I was obliged to go up so soon, I did not think it proper to trust any person to bring them down. On my return from those Courts, I was honoured with your letter of the 10<sup>th</sup> of September, and, if I could have devoted one hour to the examination of all the papers, I would certainly have done myself the pleasure to have written to you, before I went to Westmoreland, with the Judges of the Supreme Court; But as soon as the Business of the County Court at this place, was finished, I was obliged to follow them, & could not overtake them, till they arrived at Westmoreland: indeed the Chief Justice<sup>2</sup> had been so obliging as, at my request to postpone holding that Court, from the 24<sup>th</sup> to the 31<sup>st</sup> of October. Had I been favoured with your first Letter two weeks sooner, I should have requested the Judges to have holden a Court of *nisi prius* in Washington County this season, and it is probable I might have prevailed; but it was afterwards too late as they had made their arrangements as to the other

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<sup>1</sup> The Dockets of the Supreme Court show that he had cases before that bench during this period, where he is also described as "Smith, Jr.," and "T. Sm." and probably "Sm."

<sup>2</sup> Thomas McKean.

Counties.—Some Ejectments have been tried in Westmoreland, in which the titles of the Defendants were their Improvements, made before the plaintiffs had obtained their office right; notwithstanding which the plaintiff recovered—there was only one case so circumstanced in which the Jury gave a verdict for the Defendant, which the Judges immediately declared, was contrary to Law & that they would grant a new Trial, if applied for in Philadelphia, which will be done: In their charge to the Jury, they laid down the Law respecting Improvements, in opposition to office rights, so pointedly & decidedly in favour of the latter, that I believe their decision must very materially operate in your favour, so far as the Defendants' claim by settlements made under the Jurisdiction of Pennsylvania. In the last Ejectment which was tried, I had the point brought fully before the Court (having an eye to your Ejectments). The Defendant claimed by an Improvement only. I objected to its being given in Evidence—the Court ruled that it should not, & the plaintiff producing an order & survey had a verdict, the Jury not going from the Bar, having no Evidence on the part of the Defendant—this decision will produce very important Effects on the property of that Country and will, I think, shake the confidence of your opponents in the goodness of their title. I assure you it has made me more sanguine than I was before, and will warrant me in directing my attention chiefly to your legal title, on the Trial, altho' I think it necessary to keep the other in view. Permit me to make a few remarks on that Title. The date of Captain Posey's warrant does not appear by the Patent, or by any paper in my possession that I at present recollect. I hope you will not think, that I put you to unnecessary Trouble in proving the execution of Captain Posey's Bond, because altho' the recital of it in the patent is Evidence against Virginia by which the Patent is granted, yet it is no Evidence against any other, & your opponents claim under Pennsylvania. I know little more of the mode of obtaining Titles to Land in Virginia than what I have learned from your papers & therefore some observations which I have made & may make to you may be unnecessary. I have understood & I think I mentioned to you that the time of the entry of the warrant with Mr. Lewis, the

County Surveyor, is material as it is located & fixed to the spot from that time only—If it be, is a certified copy from him proof of the time, by the Laws of Virginia? I understand that the Defendants have informed themselves, what time it was entered with him & are much encouraged thereby; but this is only surmised to me. I will write to Mr. Crawford respecting his commission, but if he cannot produce it (& if it should be necessary) a certificate of it may, I suppose, be obtained from William & Mary College—if you can readily obtain such certificate & without Trouble, it may be of some use; but I am somewhat inclined to believe it is not necessary, because he was known to be an officer *de facto*, & that act recognized by the Colony. I am pleased with Mr. Randolph's Arguments; but if the Proclamation exists, which takes off the restrictions in that of 1763 & extending the Benefits of it to the Western Waters, I think it might obviate a specious objection, if you could obtain an authenticated copy of it.—The Chief Justice told me that he believes a Court of *Nisi Prius* will be held in Washington County in the latter end of May or beginning of June next. I asked whether I might give you this information: he said I might. I told him that as several points of Law would arise in your Ejectments I wished to try them before him—The Judges will in January make their arrangements for the Spring Circuit, & Mr. McKean says that if Mr. Rush will cross the mountains, he will come with him (the difficulty is occasioned by some coolness about rank which subsists between the two other Judges)<sup>1</sup>—at any rate he has been so

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<sup>1</sup>The Justices had been indicated as Chief Justice, Second and Third Justices, when these positions were held by McKean, William Augustus Atlee and John Evans. When George Bryan entered the court he was described as Fourth Justice or Judge. At the death of Judge Evans his position was taken by Justice Jacob Rush, so that while Mr. Bryan was senior in service, Mr. Rush had been appointed to succeed the Third Judge. If Judge Bryan, who was not averse to making precedents himself, construed his position as that of Third Justice after the death of Judge Evans and before the appointment of Rush, there might be ground for coolness between these two, but what ground there could be for dispute about rank between Justices Atlee and Bryan does not appear, unless Justice Bryan, who was of Philadelphia, was attempting to replace the old order of rank, by the territorial order which prevailed in the army and Assembly, namely, that based on the relative age of the counties they came from, which would make Justice Atlee, who was from Lancaster, follow the Philadelphian.

obliging, as to assure me that he will inform me, as soon as it is fixed who goes to the westward. As soon as I gain this Information, I will again have the honour of writing to you by the first Conveyance. I am going up to the western county Courts in the meantime, & if I can discover anything new, or if anything should occur to me, I shall beg leave to mention it.—I took down the names of several witnesses from Col. Shephard & Mr. McCormick, but they could not tell me with precision what they could testify; but as the decision of the Supreme Court is so materially variant from those in the County Courts of late respecting Improvements, I do not think that your title to those Lands will so very much depend upon their testimony, as I once supposed—however, it may still be of Importance.—In the last Letter which you did me the Honour to write to me, you signified your desire that I would bring actions of Trespass for mesne profits against all the Defendants respectively—that may produce a good Effect by convincing them that you are sensible of the injury they have done you, & determined to have every satisfaction which the Law can give you—or it may produce a bad Effect in the minds of the Jury who are to try the Ejectments—their modes of thinking may lead them to believe the Defendants rather unfortunate than otherwise, and that as these double actions will ruin most of them, will not the Jury be willing to lay hold of every point however trifling which may make against your Title or in favour of the Defendants. Pardon this liberty, Sir, believe me these Sentiments are dictated by the most pure & ardent desire to promote whatever may be for your Interest. I was lately taken in at the Trial of such an Action brought after a recovery in Ejectment in Westmoreland, and the Jury thinking that the Improvements which the Defendants had made were of more value to the plaintiff than all his expences & loss; found a verdict for the Defendant—the Council on both sides agreed that they must find *some* damages, as it was after a recovery in Ejectment—and the Court at the instance of both sides sent them out again—they returned & still found for the Defendant—his Council then agreed to confess Judgment for 1<sup>d</sup> damages to save the eventual expence of a writ of Error—had this action been brought before the recovery

in Ejectment, the Defendant might have gone into the Trial of the Title again & the plaintiff might have been obliged to pay the Costs.—However I will act agreeably to your orders, unless you should countermand them before the next Court at Washington County, to which I must go in less than 4 weeks—I shall endeavor to order matters respecting the appointment of the Jury in such a manner as to be as free from objections & influence as possible—we have a new Law, respecting Juries—they are drawn by Lot out of four times the Number returned by the Sheriff, so that neither party can certainly know one of the men who may try his Cause—I will endeavor to inform myself how the Sheriff stands affected, & if I shall have the least reason to suspect that he will not be impartial, I will attempt to have a special Jury named by the Court & Struck by me with the Assistance of your Friends.”<sup>1</sup>

General Washington replied at once, in duplicate, December 7 (1785), saying that he had no idea of bringing the actions for trespass before the main case was settled, “and,” said he, “from the statement of the cases which you have mentioned, I now leave it altogether discretionary with you, whether to bring them afterwards, or not. I never should have thought of this mode of punishment, had I not viewed the Defendants as willful & obstinate sinners—persevering after timely and repeated admonition, or a design to injure me—but I am not at all tenacious of this matter.” The court was not arranged for in the Spring, possibly because Mr. Smith did not want it, as he found, and also led Washington to find, for the first time, that certain dates, particularly the date of the Posey warrant subsequent to the date of the settler’s occupancy, were unfavorable. General Washington admitted it in a letter of July 28, 1786, which plainly indicates that he has, as he signs himself, a growing “very great esteem” for his attorney. The *Nisi Prius* Court was arranged for at Washington, Pa., for the 23d of the following October, but in an excellent letter of September 22, the General tells of a fever which would prevent him going to the trial as

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<sup>1</sup> The fact that this is Mr. Smith’s own hasty copy of his letter to General Washington will explain defects in it.



he had hoped he might. In it he also asks Mr. Smith to let him know what sum will meet his "expectations" for all his trouble. The letter is a most earnest and cordial one, and expresses perfect satisfaction with Mr. Smith's information that the latter had chosen Mr. James Ross to assist him.<sup>1</sup>

The results were successful. "As the Bearer is going immediately to Alexandria," writes Mr. Smith to the General, in a letter of November 7, 1786, "I lay hold of the opportunity to Inform you that on the 24<sup>th</sup>, 25<sup>th</sup> & 26<sup>th</sup> Days of October the Ejectments which I had the Honour of Bringing for you against James Scott & 12 others for Lands on Miller's Run, were tried at Washington at *Nisi Prius* & I have the very great pleasure to Inform you that Verdicts have been given in your favour in every one—your satisfaction upon this occasion may be equal to, but cannot exceed mine. I never was more agitated between hopes and fears in any Cause in which I have been engaged—I had during the War been repeatedly chosen into almost every Honourable office which my fellow citizens could bestow to which my merit gave me no pretensions and which must therefore have been the more flattering to my Vanity, but believe me Sir when I assure you that I am more proud of having it said that General Washington Selected me as his Counsel in an affair of this Importance than of All the distinguished stations [in] which I had been so often placed.

"I had good Information that James Scott, Jun<sup>r</sup> had the most plausible claim & that he was the ringleader or director of the rest—I therefore Resolved to take the Bull by the Horns, & removed the Ejectments into the Supreme Court in such order as to have it in my power to try the ejectment against him before the Rest, reserving

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<sup>1</sup> James Ross, according to Crumrine's "Bench and Bar of Washington County," p. 264, was probably admitted in 1784 in their courts, although there is no record of it. He was admitted in Fayette the same year, however, and is known to have been in practice in Washington county at that time. He was born July 12, 1762, the son of Hon. George Ross, of York county. He was an instructor in Dr. McMillan's School for some time, and was induced by Hugh H. Brackenridge to study law. He afterward became a member of the Constitutional Convention of 1790 and of the United States Senate. He died at Allegheny City, November 27, 1847. An excellent portrait of him is in possession of the Dr. Thomas McKennan family.



the Rule so that Had any unforeseen point turned up against me I could try the [case] or not as I pleased.

“That trial, therefore,” he continues, “was ordered on, on the 24<sup>th</sup> after Dinner & lasted that afternoon, the next Day and till 11 o'clock in the forenoon of the 26<sup>th</sup>, when the Jury gave a verdict for the plaintiff. I thought the other defendants would have confessed Judgment & would not have been so mad as to have risked weaker causes before the same Jury but I was mistaken—every one of them insisted on having a trial nay each would have demanded a separate trial, but as I had consolidated the Ejectments against these defendants they were obliged to try them all together, & the trial did not last long. I take it for granted that many of the Jury wished it had been in their power to have given verdicts for the Defendants. I knew that we had very strong prejudices artfully fomented to encounter. I had applied to the Court to name the Jury at a time when the Bench was filled with such of the Justices as I believed would make out the most Impartial List which it was possible to Obtain. The defendants pretended that I had taken an Advantage of them & refused to strike the Jury (as it is called) I can truly say that I only Wished to have an Impartial & dispassionate jury which I believed I could not otherwise obtain & therefore I gave them notice to attend on a certain Day at the prothonotary's office in Philadelphia to strike—they thereupon agreed that it should be done on the spot. I took down the Jury list to Philadelphia myself (having other business there) brought up the proper proofs—informed myself what Witnesses might eventually be necessary and even served the Subpœnas on as many as attended the preceding County Court.

“I was assisted by Mr. Ross in a very masterly manner—we had consulted together before I had the Honour of receiving your Letter by Col. Sims & it gave us satisfaction that we had agreed to conduct the trial upon the plan pointed out in that Letter and that I had transcribed and brought up the Cases from the Books which were not to be had at Washington to support the points on which you directed us to rely.

“In the Letters last alluded to,” he continues, “you de-

sired me to inform you with what sum you can equal my expectations and that you will Lodge it for me in Philadelphia. I have had motives in conducting this business far more forcible than pecuniary considerations & therefore I trust you will pardon me If I decline naming any sum. Mr. Washington who was at Fayette County with you or Col. Sims will readily point out what is usual on such occasions and Mr. Ross (to whom I have promised to divide with him what I receive) & I will be perfectly satisfied. I hardly know how to express myself—let me assure you that I do not wish to receive a large Fee.

“I will take your papers to Carlisle and will send them from thence to such place either in Philadelphia or Baltimore as you will please to point out.

“I believe that the defendants in the Ejectments will be with you soon and endeavor to do what the[y] ought to have done when you made them the offer. I verily believe that it was more their misfortune than their fault that they then rejected it. You have now *thirteen* plantations—some of them well improved. I take it for granted that the Improvements Increase the Value of the Land much more than all the expences of the Ejectments; those who made them are now reduced to Indigence; they have put in crops this season which are now in the ground they wish to be permitted to take the grain away. To give this hint may be Improper in me—to say more would be presumptuous.

“Orders for obtaining possession cannot be Issued till the Supreme Court sits in January it will be necessary that you appoint an Agent in that Country to take possession and to [ ] the Lands for you, otherwise the fences & even the Buildings will probably be burned or otherwise destroyed.

“Major Freeman put into my Hands several small Bonds due to you to put in suit. I have recovered most of the Money and paid over to him. he says he has some Others which when the Money shall be recovered I will pay in like Manner he seems to be as attentive to your Interest as to his own.

“I pray you excuse the length of this Letter it is written during the Hurry of the Court here and therefore

I had not time to make it shorter nor to write so fully as I wished.”<sup>1</sup>

It was a very long time before General Washington replied, but when he did write, as he did September 16, 1787, at Philadelphia, the next to the last day of the Federal Constitutional Convention, he explained that he found it impossible to write earlier. “I still wish,” he says, “that you would do so,” referring to the fee, “and receive it out of the money which—by Major Freeman’s report to me—you must be at the point of receiving—and permit me to add moreover that I wish yet more ardently I had it in my power to pay you in a more agreeable manner than this, but the fact is, my expenses in this city have been so much greater than I expected that it has deprived me of the means. \* \* \* For the anxiety you express to have undergone during the prosecution of the Ejectments, I feel myself exceedingly obliged, and pray you to accept my thanks for this proof of your zeal as much as for the good wishes you are pleased to express for me.”<sup>2</sup> This letter was miscarried, however, so that Washington wrote another on December 3 next, again asking about the fee. On the back of this Mr. Smith has left his copy of his most interesting reply, dated February 5, 1788, at Carlisle.

“On my return from the Western Courts, two weeks ago,” it reads, “I was honoured with your letter of the 3<sup>rd</sup> of December last inclosing a duplicate of another letter dated the 16<sup>th</sup> Sept<sup>r</sup>. Since my return I have had no opportunity of writing to Philadelphia until now. I did not receive the letter of the 16<sup>th</sup> Sept<sup>r</sup> till the middle of November & having by my letter of the 26<sup>th</sup> October anticipated an answer to it, excepting as to one point, I did not think it proper to take the liberty of writing again to you at a time when affairs of such infinite importance to your country must greatly engage your attention.—My business requiring me to go to Philadelphia in November I did not think myself at liberty to express myself on the

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<sup>1</sup> The haste, in both the original and this copy by Mr. Smith himself, explains its defects.

<sup>2</sup> This and the two succeeding letters are among the De Renne Papers, and serve to nearly complete those of the C. P. Humrich collection at Carlisle.

excepted point until I should take the opinion of some of my law friends there nor until I should see Mr. Ross—I mean on your proposition respecting the trial fees in the ejectments in Washington county—According[ly], spending an afternoon with Mr. Wilson I asked his opinion, informing him that it was not my wish; & I was satisfied that it was not Mr. Ross's wish to receive any extraordinary fee, but that as you had put the matter on so delicate a point as leaving the quantum to me, I wished to be guided by my friend's advice—Mr. Wilson replied he was not at liberty to give his opinion, intimating as I conceived you had spoke to him on the same subject & that he had declined forming an opinion. I then requested Mr. Yeates to favor me with his opinion—he replied that he thought £100 to each would be a reasonable & liberal fee—Permit me to assure you that I shall be perfectly satisfied with less & so will Mr. Ross I am convinced, although he would not name any sum when I asked him at the last circuit, but he leaves the whole [matter] to me. However, in order that you may guess with what sum I will be satisfied, I have retained only £50 for myself, & paid Mr. Ross the like sum including a sum which he was to receive from one Jackson on your account by my order.”

After some further remarks about the other cases this letter closes; but he writes another on the 20th of February, 1789, in which, after mention of other phases of the new cases, he writes an interesting paragraph which may be used in closing the account of this much-prized case. “Give me leave,” he writes, “to congratulate, with the utmost sincerity & highest satisfaction, the United States of North America, on the new prospect which they now have of being guided to dignity, honour & happiness, and of being made really independent & united; that you may long, very long fill the great and important station, to which you will soon be called, by (I trust) the unanimous voice of that society to which you contributed so essentially to give political existence, is the ardent wish of him who is with the utmost respect, Sir;” etc.<sup>1</sup>

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<sup>1</sup> Mr. Smith finished all of General Washington's business in April, 1791. Letter to Judge Jasper Yeates, July 18, 1791, in the collection of Smith letters, in the possession of D. McN. Stauffer, Esq., Yonkers, N. Y.

Judge Edward W. Biddle, the President Judge of Cumberland county, and a historian who has made greater research into her legal history than any one else, says: "Thomas Smith was admitted to the bar of this county in April, 1778, but his legal practice here was slight before he became a resident of Carlisle in 1782. In the next nine years, \* \* \* he had a good local practice, but not a large one. During that period Thomas Duncan (Justice from 1817 to 1827) had the most extensive business, whilst Jasper Yeates (Justice from 1791 to 1817) and James Hamilton (President Judge from 1806 to 1819) and other distinguished lawyers were also active practitioners. There was marked ability at our bar at the time referred to and it is much to the credit of Thomas Smith that General Washington should have selected him, from a body of such strong men, to conduct ejectment proceedings in Washington county. \* \* \* Being a painstaking and exact man, his work was always well done."

His work was so largely before the Judges of the Supreme Court during this period that after the above glance at his local practice at Carlisle, a glance at his local practice at Bedford for the rest of his period of practice will be of interest, especially because it will complete a picture of his work in the court in which he began his legal career. In 1785 the strongest lawyers of central and western Pennsylvania had practice in the Bedford Court of Common Pleas, and yet Mr. Smith was in nearly fifty per cent. of the cases had that year, namely, sixty-two out of one hundred and twenty-seven.<sup>1</sup> The next year he was in fifty-seven out of the one hundred and forty cases before that court, and nearly always in the cases employing more than one attorney on each side.<sup>2</sup> The

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<sup>1</sup> These were divided as follows: 16 out of 34 at the January term; 12 out of 23 at the April term; 20 out of 42 at the July term, and 14 out of 28 at the October term.

<sup>2</sup> A letter from Hartley at York to Yeates at Lancaster at this period, namely, September 9, 1786, says: "You know that Mr. Thomas Smith will not be at the Supreme Court at Franklin; Mr. Chambers, Mr. Duncan and I will have to fight the battle against Stewart and your own notes will not be amiss upon the trial." Yeates Papers at the Pennsylvania Historical Society, 1300 Locust street, Philadelphia.

At the January term of this year Mr. Smith had an interesting case, in one Samuel Dean, a white farmer of good standing, near Bedford, who complained that he had been maliciously called a



two Woodses, the elder and younger, had the greater amount of business still, and Duncan, Hamilton, Riddle, Dunlop and Ross each had an excellent practice. In 1787 he was engaged in seventy-two out of the one hundred and eighty cases—a year of great legal business there. At the April term he was in exactly fifty per cent. of the cases. The year 1788 gave a similar record, namely, sixty-four out of one hundred and forty-eight cases, with nearly fifty-eight per cent. at the October term, and the year 1789 showed forty-three out of one hundred and twenty-nine. There were forty-one of the one hundred and forty-four cases of 1790 to Mr. Smith's credit, and for the three remaining terms of practice in 1791 he took part in twenty-four cases out of a total of seventy-four. This engages him in almost forty per cent. of the practice of the local court of Bedford county during the last nearly seven years of his practice. This is a very large amount of business for a man who was continually following the Judges of the Supreme Court.

Referring to his entire business during this last decade of his practice, he says: "I did not write less than 4,000 letters on it, during the last 10 years I was at the Bar."<sup>1</sup> "My Professional duties at the Bar," he says elsewhere, "were uncommonly laborious, having for 9 years rode upwards of 3,000 Miles  $\text{per annum}$ , over the most mountainous parts of the State, which being newly settled, bordering on the Indians, & having been almost depopulated by the Indian war, the accommodations were, of course, generally very bad."<sup>2</sup> "Being obliged to follow the Judges of the Supreme Court the moment the County Court ended in this place [Bedford], a ride Day and Night to overtake them and to attend the Western Circuit, from which we returned last Week, I have not till now had an opportunity," etc., is a not uncommon description of his situa-

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mulatto by a certain family, and that it had led to ostracism. A most serious result of the ostracism, too, was that his Elizabeth had broken their engagement. He got Mr. Smith to bring action against the slanderers.

<sup>1</sup>Letter to Dr. Peter Smith, Aldie, Cruden parish, Aberdeenshire, Scotland, August 11, 1795. De Renne Papers.

<sup>2</sup>Letter to the same, September 16, 1804. De Renne Papers.



tion during this entire period.<sup>1</sup> It is hardly possible for a man with such a record as this and one so vigorous, sound and able in public life as he had proved himself, not to be considered by leaders for higher positions of trust, responsibility and honor, even if there were no other reasons for it. In the case of Mr. Smith, however, there were other reasons, also, and these had to do with most interesting and important developments in the life of both State and Nation, which came to a climax in the summer of the year 1791.

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<sup>1</sup> From a letter to the Comptroller of Accounts of Pennsylvania, dated November 26, 1783, in the possession of Simon Gratz, Esq., Philadelphia.

## X

### REORGANIZATION OF THE JUDICIARY UNDER THE NEW CONSTITUTION OF 1791

#### PRESIDENT JUDGE OF THE FOURTH JUDICIAL DISTRICT AND MEMBER OF THE HIGH COURT OF ERRORS AND APPEALS

1791

If Thomas Smith wished to avoid public life and devote himself unremittingly to his profession, he chose the right place to secure those results when he made his home in the capital of Cumberland county in 1782. That mountain region, which sent Robert Whitehill to the Assembly so often, was ardent in support of the blood-sealed Constitution of 1776, and it was safe to predict that no well-known opponent of the single-branch Legislature which characterized it would be called from his private duties to public councils.

Indeed, it looked as if this Constitution was, as its opponents had feared it would be, "fastened" upon the people of Pennsylvania for all time, for it was evident that even with the return of the old anti-Constitutionalists to power there was no inclination to make a direct attack on it. They could afford to take their own time and methods concerning it, since they were in control of the single-branch Assembly wherein was vested all the power. Events, however, were rapidly solving their problem for them, or at least indicating the direction the attack should take. Ever since 1780, when young Hamilton, of New York, wrote James Duane, intimating that the old Confederation ought to be strengthened and suggesting elements of a Federal Constitution, the seeds of a movement toward that end had been slowly germinating, and every new weakness betrayed by the Continental Congress only

hastened the process.<sup>1</sup> The long struggle to reform the finances, begun when Mr. Smith was in Congress, and the effort to secure a revenue by national imposts was still on, the opposition consisting of New York, Rhode Island, Maryland and Georgia. It was the action of New York in May, 1786, on this matter which brought things to a crisis. It is not the purpose here to enter into the history of the Federal Constitution. Suffice it to say, that to reorganize the finances required the reorganization of the Confederation, and a convention was called to meet in the old Declaration chamber of the State House at Philadelphia on May 14, 1787, just below the room used by the single-branch Assembly of Pennsylvania, when it met, and opposite that used by the Supreme Court and High Court of Errors of Pennsylvania.<sup>2</sup>

The convention, after four months' hard work, completed our present great Constitution and adjourned on September 17. They sent the instrument to Congress, then sitting at Annapolis, and the next morning it was also read to the General Assembly up stairs and copies were given to the press of Philadelphia, in which it appeared on the 19th. Discussion and compromise it produced in Congress in abundance, but the appearance of this instrument of checks and balances, separation of executive,

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<sup>1</sup> Constitutional History of the United States, by George Ticknor Curtis, 1889, Vol. I, p. 236.

<sup>2</sup> In the "Life of Rev. Manasseh Cutler," 1888, Vol. I, p. 262, in his diary under date of Friday, July 13, 1787, speaking of his visit to the State House at Philadelphia and the central hall, he says: "From this aisle is a broad opening to a large hall, toward the west end, which opening is supported by arches and pillars. In this Hall the Courts are held, and, as you pass the aisle, you have a full view of the Court. The Supreme Court was now sitting. This bench consists of only three Judges. Their robes are scarlet; the lawyers', black. The Chief Judge, Mr. McKean, was sitting with his hat on, which is the custom, but struck me as being very odd, and seemed to derogate from the dignity of a Judge. The hall east of the aisle is employed for public business. The chamber over it is now occupied by the Continental Convention, which is now sitting, but sentries are planted without and within—to prevent any person from approaching near—who appear to be very alert in the performance of their duty." It is probable that when the Assembly met the Continental Convention took the room below and the Assembly that above, as it is not probable either Mr. Cutler or Editors McMaster and Stone, in their "Pennsylvania and the Federal Constitution, 1787-1788," p. 1, who place the convention below and the Assembly above at its close in September, could make so glaring an error.

legislative and judicial functions, and even a double-branch Legislature, came upon the lovers of the old Constitution of 1776 like a bolt out of a clear sky and roused them to the belief that they were the victims of a conspiracy. That General Washington was President of the convention which framed it, and the venerable President of the State, Franklin, the leader of the Pennsylvania members, did not signify.

The struggle at once began in the Assembly over the call for a ratifying convention. The old "Constitutionalists" who defended the Constitution of 1776 were led by a "junto in Philadelphia" of which Judge Bryan was the head. The new instrument, if adopted, compelled a change in the State Constitution. They were adroitly thrown on the defensive. What was then, and long afterward, in their minds, is indicated by a résumé of the situation found among the papers of Judge Bryan: "What has been called the anti-constitutional or Aristocratic Party then governed our Councils and the representatives in Convention were chosen almost wholly of that party & entirely from the city of Philadelphia. The convention met without much expectation of anything very important being done by them until towards the close, altho' from Intimations now made, beforehand, by some foolish members (as they were thought) of the Society of the Cincinnati, that nothing less than a monarchy was to be erected & that the people of Massachusetts were driven into Rebellion for the very purpose of smoothing the way to this step by their suppression."<sup>1</sup> The names of the parties were now reversed: the old "Constitutionalists" now became the "Anti-Constitutionalists" in regard to the Federal instrument, and the "Aristocratic Party," to which Mr. Bryan assigned Thomas Smith, became the "Constitutionalists."

The Assembly, then composed of sixty-nine members,

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<sup>1</sup> This paper is unsigned, and is evidently a copy of a reply to some questions, which accounts for the omissions which involve the sentence. These Bryan Papers were located by the writer in the possession of Hon. W. F. Bryan, Mayor of Peoria, Ill. Some of the papers, also, are owned by Mr. S. S. Bryan, of Titusville, Pa. The Pennsylvania members of the Federal Convention, which framed the Constitution, were Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimmons, Jared Ingersoll, James Wilson and Gouverneur Morris—all of Philadelphia.

contained a Federal or "Constitutionalist" party of forty-four. Two more were required for a quorum. Whitehill, Findley and the rest of the anti-Federalists determined to absent themselves when the time came for voting for a convention. The people in favor of the Federal program determined that two of them should be present, and proceeded to capture a Franklin and a Dauphin county member and carry them by force to the State House chamber to secure a quorum.<sup>1</sup> The Assembly then voted for the first Tuesday in November, 1787, for election of delegates to a ratifying convention. Four weeks remained, and the canvass grew very bitter.<sup>2</sup> "Centinel," supposed to be written by Judge Bryan and his friends, as the "Federalist" was by Hamilton and others, was the strongest series of papers against the Federal program. Mr. Wilson, on October 6, at the State House, made the greatest defense of it in Pennsylvania. The convention met at the State House on November 21, 1787, and proved to be one of the most representative and strong bodies ever elected in the State, and safely Federal in sympathy. Whitehill, Findley and others were there to fight the ratification; James Wilson was the leader of the Federalists—and a right valiant champion he was. "I have just returned from Convention," writes Jasper Yeates to his wife, on November 24, "where I have heard one of the most sensible, learned and elegant speeches delivered by my Friend Wilson on the new Constitution of the United States, that my ears were ever gratified with. He touched on the Difficulties of forming the new Government—the Inadequacy of the Late Confederation to the Purposes of America—the different

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<sup>1</sup>Judge John Stewart, of Franklin county, tells the writer that he drew the attention of the late Hon. Thomas B. Reed to this instance as an interesting example, which might throw light on Mr. Reed's own quorum problems.

<sup>2</sup>The activity of the anti-Constitutionalists is indicated by a bitter reference to them in the *Gazette* of October 3. "Is it constitutional or right," says "An Assemblyman," "for one of the Judges of the Supreme Court to interfere with his *personal presence* in the proceedings of the Council and Assembly of the State?" This refers to Judge Bryan. The Council refused to call the convention, and the Assembly published their own call. A copy of this call is bound in with the volume of the *Gazette* for 1785-1787 at the Pennsylvania Historical Society.

Species of Governments and the general Principles of the proposed Constitution in the most masterly manner."<sup>1</sup>

How the Federalists looked upon the speeches and essays of the anti-Constitutionalists of the State is indicated in the following "Receipt for an anti-Federal Essay: *Well-born*, nine times—*Aristocracy*, eighteen times—*Liberty of the Press*, thirteen times repeated—*Liberty of Conscience*, once—*Negro Slavery*, once mentioned—*Trial by jury*, seven times—*Great Men*, six times repeated—*Mr. Wilson*, forty times—and lastly *George Mason's Right Hand in a cutting-box*, nineteen times—put them altogether, and dish them up at pleasure."<sup>2</sup> There were strong speakers on that side, however, and when it became evident that the new instrument was to be adopted, Mr. Whitehill on December 12 offered amendments which they claimed would remove all objections. "They were fifteen in number," say McMaster and Stone, "and are remarkable as containing the substance of the ten amendments afterwards added to the Constitution. Similarity so marked cannot be accidental. There is much reason, therefore, to believe that when Madison, in 1789, drew up the amendments for the House of Representatives, he made use of those offered by the minority of the Convention of Pennsylvania."<sup>3</sup> Their action was in vain, however. "The Constitution offered us," wrote Jasper Yeates to his wife on the same day, "has been ratified by a majority of 46 to 23 and tomorrow we shall proceed to sign and seal & then publickly announce it at the Court House, with Firing of cannon, &c." Robert Whitehill of Cumberland county went back home with only a hope that other States might not ratify it, and Judge Bryan at once took measures to aid in preventing such ratification. His party already had well-organized committees of correspondence. And yet this activity was not so much objection to the new Constitution as it was devotion to the old Constitution of 1776, which they conceived they were bound by oath not to change, except

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<sup>1</sup> Letters of Jasper Yeates to his wife, in the possession of Dr. Alfred Whelen, of Philadelphia.

<sup>2</sup> The *Pennsylvania Gazette*, November 14, 1787.

<sup>3</sup> Pennsylvania and the Federal Constitution, 1787-1788, edited by John Bach McMaster and Frederick D. Stone, 1888, p. 19.

<sup>4</sup> Whelen Papers.





JAMES WILSON  
Half-tone of engraving by Edwin,  
in Wilson's Works edited by his son



through the septennial meeting of the Council of Censors. It required two-thirds of this Council even to recommend a change, but that body was chosen "in such a manner that seven counties (Luzerne, Huntingdon, Fayette, Franklin, Dauphin, Bedford and Northumberland), having 13 members and 13,000 electors, can prevent any alteration from being *even considered by a convention*, though desired by all the rest of the counties, who have 57 members and 57,000 electors."<sup>1</sup> "Our Supreme Executive Power," says another Federalist writer, on February 13, "is by this very constitution [of 1776] created by the votes of 24,000 electors, out of 69,000"—24,000 outvoting 45,000. The anti-Constitutionalists were making their last fight for the Constitution of 1776, which Thomas Smith had so vigorously opposed.

The bitterness of the fight on the side of the anti-Constitutionalists is well illustrated by two letters of Judge Bryan to one of his correspondents, on March 7. They fell into the hands of the Federal party and were published in full in the *Gazette* of April 2. They were submitted to the editor with the remark that they "afford one proof amongst a thousand, that the indefatigable monster, the CENTINEL, is endued with a zeal and activity in every work of mischief always commensurate with its extent." "Last Tuesday," says Judge Bryan in the first letter, "the post from New England brought sad tidings for some folks here. The Convention of New Hampshire, it seems, by 70 *against*, and 40 for, have adjourned till 17<sup>th</sup> June. Had the final adjustment of the new system been put, it would have been rejected by a great majority. The friends of it, therefore, to let it fall easily, proposed the adjournment, and the others gave way. This disaster we consider as fatal to the business. So do its advocates here, and they are in the dumps, and some of the members of the General Convention are apologizing for their conduct. Before this news came, the party was up in the skies, as their behavior seemed to express. Yet their success at Boston was so moderated by the propositions for amendment, which, however superficial, broke the facility of the new Constitution. Besides, the president of the

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<sup>1</sup> *Gazette* of January 9, 1788.

Boston Convention, *Hancock*, has written to our Assembly, sending their doings and the amendments, and desiring that this state would adopt similar amendments.—On the whole, as New York is not likely to concur; nor Virginia, tho' General W. lives there; nor Rhode Island; and as N. Carolina Convention meets not till 17<sup>th</sup> July, and will be much swayed by Virginia; as Maryland is much divided, if not on the whole against; I have no doubt there will be another Convention. Georgia acceded to it because pressed by an Indian war, and wanted aid immediately.

"Failing," the sanguine Judge continues, "the conspirators against equal liberty will have much deceit and wicked conduct to answer for. They have seduced the post-officers to stop all newspapers from state to state, that contained investigations of their plan, so that the dissent of the minority of Pennsylvania did not get to Boston before their Convention rose. Every little town furnished a flaming account, like those of Carlisle, Bethlehem, &c., asserting how much the people of their place and neighborhood approved the new plan. These were circulated and re-printed from Georgia to New Hampshire, with parade. This deceived the people into a notion that there was a general approbation. In Virginia, at this moment, from the suppression of intelligence and by false letters, it is generally supposed the opposition in Pennsylvania had vanished; and at Boston, the news of the disturbances at *Carlisle*, reaching Boston before the Convention there rose, the whole was confidently denied. As the Convention of Massachusetts was finishing, a vessel is made to arrive at port 15 miles off, with account that N. Carolina had adopted, tho' that Convention sits not before July. Again, as the Convention of New Hampshire was near finishing, this falsehood is newly published at Newport in Rhode Island, and another vessel pretended, to seduce another adoption. These are but a specimen of these arts and inventions. But a lying tongue is but for a moment. The people everywhere will see and feel their frauds. Yet these are generally the doings of the first men in many of the States. I say nothing of the fraud of calling Conventions hastily in all the New-England States, save Rhode Island, which has called none, in New Jersey, in Pennsylvania and Delaware. In the Southern States (all except Georgia)

the calls of Conventions have been deliberate and distant; so in New York. I am glad of the prospect we have, because it will prevent the danger of confusion and bloodshed. For if nine states had been nominally led into the plan, while the body of the people in many of them were still averse, civil war must have ensued, as the Conspirators would have endeavored to set their scheme in motion, without funds to support the necessary standing army. This danger now seems to be over, for which we ought to be thankful.

"In Cumberland county," he continues in relation to the riots at Carlisle, "all are against it, except a small group in Carlisle, and a few, very few, scattered in the country. This small group, in October, met and censured their county representatives for attempting the breaking up of the late General Assembly, to prevent the calling of the people of every county east of Bedford to elect Convention in nine or ten days; with other matters favoring the new plan. These were paraded in the *Carlisle Gazette* as the sense of the people, and by the party published here and elsewhere. The county resented it, and warned these men not to repeat the artifice. Yet on the 25<sup>th</sup> December the same people attempted to rejoice on occasion of the adoption by the Convention of Pennsylvania. They were hindered: some blows ensued. Next day the same men, armed, made another essay; they were overpowered, and the effigies of two leading members of Convention were burned in contempt. Upon this, a letter with many affidavits was dispatched to Mr. McKean, pressing his warrants for 20 persons, charged with riots; among others Justice Jordan. The business being irksome, Mr. McKean, alleging it was indelicate for him to act when he was ill-used, persuaded Mr. Atlee, and laboured me to send up our warrant. I represented the danger of risking insult to our precept, advising delay, and the rather, as no hasty steps had been taken to bring the city rioters to justice. Mr. A. and Mr. Rush sent up their warrant. It lay some time in Carlisle, unexecuted, to bring the accused to submit and ask pardon. Nothing being done however, in this way, about the 26<sup>th</sup> of February the sheriff was set to work. Eight or nine refusing to give bail, they were imprisoned. By the last accounts from Harrisburg, large

numbers were assembled, from York and Dauphin, as well as Cumberland, to set the prisoners at large. This gives much uneasiness to the Conspirators here. Even the Chief Justice, 'tis said, had before the news came consented to drop the prosecution, as the members of Council feared the event. But he wrote Mr. Atlee too late, if he has written. We hope no further mischief will ensue, tho' the Conspirators in Carlisle told Mr. McKean in their letter, they feared that their dwellings would be pulled down. Here, in October, we were forced to hold our tongues, lest well dressed ruffians should fall upon us. At this day the case is otherwise. Yet many are still silent, lest, the new plan being adopted, they might hereafter be ruined for opposing. Since it was commonly safe from immediate attack, some of us have been open and avowed, and risked all the malice of these men. The common people are latterly too much of our opinion to hurt us. Indeed, none but *gentlemen mobs* have been active in Philadelphia.

"In Montgomery," he continues, "the current of the county is against the plan, the friends of it are silent; Berks very few, who favour it; the same in Dauphin. In the town of Lancaster there is a party, but few elsewhere in the county. In York, the opposers are very numerous. In Franklin they are the great body of the people. In Bedford and in the overhill counties very few are for it. Of Northumberland I can say little. Our friends in Bucks and Chester are much increased. The Quakers are changed generally. The solid Quakers here greatly dislike it; but they do not intermeddle. Their young people favour it, and in this city, Baltimore, New York, Boston, &c. there is a majority for it; most so in Boston. *Shays* insurrection has been made a great engine of terror to dispose people of that country to receive chains, if the Western counties can be kept down. Shays and his adherents were roused to what they did by excessive taxes; perhaps contrived to dispose the New-England States to receive the new system, to which they would otherwise be averse.

"Since writing the foregoing," the letter proceeds, "we have accounts from Carlisle, that about 1000 armed men appeared there, and demanding of the sheriff to open the prison, set at liberty the persons charged as rioters, and



burned the commitment. The inhabitants of the town, in the meanwhile, kept close within their houses, and the armed men soon went away without doing anything further. \* \* \* \* The peculiar reason why the party for the new Constitution is large here, is the supreme influence of the Bank, the weight of Mr. Morris," etc.<sup>1</sup>

During the campaign, Bryan's fellow-member of the High Court, Admiralty Judge Francis Hopkinson—whose wit and humor was a feature of the press of the day—made Bryan the object of his humor, with both pencil and pen. Oswald's *Gazetteer* seemed to take especial delight in spreading the articles broadcast. The new Constitution of the State, which was bound to come, was referred to as "The New Roof," and Bryan, because of his supervision of the birth of the old Constitution of 1776, was called "Margery, the mid-wife;" Oswald enjoyed referring to him as "Little Margery" thereafter. But the most interesting skit by Hopkinson was one based on the theory that Bryan, in fighting for the old Constitution, wanted to leave it as his political portrait, so to speak. So Hopkinson, in his usual allegorical style, wrote "Surveying as Applied to Portraiture," saying that, once, in the settlement of an estate he was astonished to find that the owner had left his land to a certain heir in such form that the specification, when drawn on paper, formed a portrait of the late owner! With apologies to Mr. Peale and others, he draws an illustration, and recommends the method to the consideration of artists generally. No name was used, but as Judge Hopkinson was no mean artist himself, the people instantly recognized it as a cartoon of Judge Bryan. Allowing for its humor, even a grandson of Bryan, who knew him personally, acknowledged it to be a good representation of the great defender of the Constitution of '76. It is herewith reproduced from a volume of Hopkinson's essays, published after his death in 1792.<sup>2</sup>

<sup>1</sup> The *Pennsylvania Gazette*, March 26, 1788. Letters of Hon. George Bryan to Mr. John Ralston, Allen township, Northampton county, Pa. See Preface for Smith's account.

<sup>2</sup> The present generation is indebted to the thoughtfulness of Hon. James T. Mitchell for the identity of this cartoon. The late Hon. George S. Bryan, United States District Judge for South Carolina, told him some twenty years ago that there was such an article and portrait in Hopkinson's MSS. works at the American Phil-

Judge Bryan and his friends labored and hoped in vain, however. The new Constitution was adopted, and on July 9 Philadelphia celebrated with a great federal procession of eighty-six sections, the thirteenth of which was the car "Constitution." On this car were seated the members of the Supreme Court, Chief Justice McKean and Justices Atlee and Rush, in their red robes of office—all except Judge Bryan.<sup>1</sup> The Constitution was accepted by the Bryan party, but they at once took measures to secure their amendments to it by calling a Conference at Harrisburg, which met September 3. It was said that this meeting originated in Cumberland county. It was noticeable, however, that Judge Bryan headed the list of thirty-three members. It is probable, too, that the amendments attributed to Mr. Whitehill were more largely due to Judge Bryan than to any one else. The letter already quoted and his remarkable leadership in this long fight of over a dozen years abundantly illustrate his adroitness in accomplishing important ends as a popular leader.

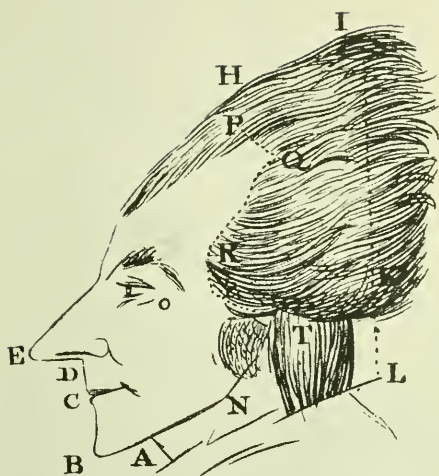
The Federalist program made uninterrupted progress. State President Mifflin was elected in November, and James Wilson and others were chosen National Presidential Electors in January, 1789.<sup>2</sup> On February 18, the *Gazette* said: "The Constitution of Pennsylvania, says a correspondent, can be altered only in two ways. 1<sup>st</sup> By a Council of Censors, and 2<sup>nd</sup> By a vote of the people. From the manner in which the Censors are chosen, there is no probability that the Constitution will ever be altered by them. On the contrary, there is reason to believe one of their

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osophical Society; that he had seen it, and, knowing his grandfather, considered it an excellent likeness, allowing for the humor. The present writer found the original, as he had said, and, some time later, also found the article in Hopkinson's "Miscellaneous Essays," published in 1792, the article being in one volume and the cartoon in another, with nothing to indicate any relation between them, as in the original manuscript. This was because the several illustrations of the work were placed on one plate. It may be added that attempted impeachment of Judges was a favorite diversion of malcontents in our early days. Judge Hopkinson was tried and acquitted, and Oswald petitioned for the impeachment of the whole Supreme Court.

<sup>1</sup>The *Pennsylvania Gazette*, July 9, 1788.

<sup>2</sup>Dr. Smith was working, as he had been for ten years, for the restoration of the college charter, at this time, and soon saw his efforts crowned with success.



GEORGE BRYAN

A Political Cartoon, by Judge Francis Hopkinson  
Half-tone of Engraving in Hopkinson's "Essays".



first acts (should they ever be permitted to assemble again) will be to *condemn* the adoption of the Federal Government, and all the Federal laws that have been enacted under it. From the late increase of new counties, there can be no doubt but the anti-Federalists will compose a majority of the Censors. Under these considerations, will it not be proper, or rather will it not be the duty of the Assembly to recommend a Convention to be chosen next October, to alter the Constitution of the State. \* \* \* The present Constitution of Pennsylvania never received the sanction or the approbation of the people. It was forced upon the State by a few needy men, while the best men in the State were in the field, opposing the enemies of their country."

In March it became evident that General Washington was elected President. Philadelphia wished to become the capital. "The Hall of our General Assembly," said one writer, "will accommodate one hundred members, with chairs and tables, within the bar, and that it will contain two hundred persons in the gallery without the bar—\* \* \* the apartment above, in which the State Convention of 69 members held their debate, is of the same dimensions, \* \* \* the great Hall in the new Court House of the County of Philadelphia, just finished at 16,000 dollars (exclusive of the value of the lot) is capable of accommodating 100 members, and near 500 auditors in the gallery and without the bar. \* \* \* the Hall of Justice, in which our Supreme Courts are held, is the most spacious apartment of that kind in the United States," with more of like tenor.<sup>1</sup>

On March 24, 1789, the Assembly, by a vote of 41 to 16, recorded a vote for a Constitutional Convention, at the next general election, to be chosen in the same manner as the Assembly. The Council had a majority of one against it. It made no difference. The tide was Federal.

<sup>1</sup> Although having no connection with this subject, a letter written at this time by Thomas Smith to Bernard Gratz, in Philadelphia, dated March 9, 1789, and now in the possession of Simon Gratz, Esq., of Philadelphia, gives a little picture of Mr. Smith's participation in the sideboard customs of his time, and his appreciation of humor. "Since I began this," the postscript reads, "I have drained the last bottle of the—the—the *mixed* (for I could not call it *Madeira*) wine; for sending it to me, you ought never to repose in Abraham's Bosom, had it not been for the good spirits and very good Port Wine which you sent me, like a clever fellow."

April saw Washington in the President's chair, and the doughty Federalists of Pennsylvania were pushing their cause. The most notable opposition to the new convention was in Cumberland county, Mr. Smith's home. The question was ably discussed in the press, but the arguments were little different from those made in the days of the Fort Wilson riots. By July, even Georgia had deserted the single-branch Legislature. In August the Pennsylvania Assembly took the oath of allegiance to the National Constitution, and this was welcomed as a sign that the long fight of thirteen years over the Constitution of 1776 was nearly at an end. By September there was a much better feeling, as though the inevitable was accepted, and an election of a convention was held October 13, with great Federalist success. Among those elected were Hon. James Wilson and Thomas McKean, of Philadelphia; Robert Whitehill, of Cumberland; Jasper Yeates, of Lancaster, and Charles Smith (one of Thomas Smith's old students), of Northumberland. In December the Convention was at work in Philadelphia with Thomas Mifflin as President of it. By March, 1790, the new instrument, which was destined to last down even to our own time, was adopted by the Convention, and, in April, Franklin died. From this time on the campaign for the Governorship of Pennsylvania, in which Mifflin and St. Clair were candidates, seems much like a campaign of the twentieth century. In July the people of Philadelphia were delighted at the settlement of the national capital question, by which she was again to be, not only metropolis, but capital of both State and nation, until 1800, when it should be established in the Federal city to be built on the banks of the Potomac. By December, 1790, President Washington and the national government were established again in the city where the latter had been created. State House Square was the scene of vast and far-reaching activities during that month. What an upheaval it was during those cold December days at Chestnut and Sixth streets! With Governor Mifflin's election by a majority of nearly 25,000, and his inaugural on the 21st, the new modern Constitution of Pennsylvania was in full operation, beside the new government of the United States. What a work was there now before judges, lawyers and law-students! Newly



created sources of fundamental law everywhere in America!

One of Thomas Smith's law-students, his nephew Charles, son of Provost Smith of the restored College and lately a leader in forming the new State Constitutions, realizing the situation, had applied to the trustees to open a Law School in the College, as Dr. Morgan had opened a Medical School years before. It seemed, however, the time was ripe for that now well-recognized interpreter of the new order, James Wilson, to be made a Doctor of Laws and inaugurate, in the midst of these December activities, an authoritative and extended exposition and defense of the new Constitutions. And this was done, with great *éclat*, at College Hall, on the 15th of that month, before President Washington and the leaders of both State and nation.

On the 23d of December, 1790, Governor Mifflin proclaimed all who then held commissions under the late Constitution as in office until further notice. This made Judge Bryan of the Supreme and High Court of Errors still a member of those benches under the new Constitution, but he was not destined to long survive the passing of the Constitution of 1776, in which so much of his life had been bound up. The intense fight that he had made had for some years past left visible marks of decay upon his person, but not on his clear and vigorous mind. Scarcely a month passed since the proclamation by Governor Mifflin, when, after a short illness, Judge Bryan died, on January 27, 1791, at the age of sixty years. The *Gazette* spoke of him in the highest terms in its issue of February 2. "The firmness of his resolutions," said the writer, "was invincible, and the mildness of his temper never changed. His knowledge was very extensive; the strength of his memory verified what has been thought incredible or fabulous, when related of others. His judgment was correct, his modesty extreme, his benevolence unbounded, and his piety unaffected, and exemplary. \* \* \* If he failed in any duty, it was, that he was possibly too disinterested:—his own interest was almost the only thing he ever forgot." Thus closed the life of the greatest power behind the Constitution of 1776—the man of whom, fifteen

years later, A. J. Dallas said: "His memory will last as long as liberty has an advocate in America."<sup>1</sup>

In a certain sense, the Constitutional conflict in Pennsylvania was now ended; in a certain other sense, it was not. So far as the conflict of the two systems of government was concerned and Judge Byran's leadership of it, that was, of course, at an end; but the desire of the people to control the judiciary, and their ultimate success, in 1851, in securing their election by the people, was undoubtedly inherited from this long and bitter controversy. The party to which Thomas Smith belonged had succeeded at last, although the political complexion of his home county prevented him being so much of a figure in it in the closing contest. The leaders in the new movement, however, recognized the importance of his work in the long struggle. In the wholesale reorganization of both State and national government he was kept in mind for an important post, but the claims of those on the ground at Philadelphia were numerous and well urged. The new Constitution made the Supreme Court commissions to extend during good behavior, instead of for terms of seven years. Consequently, it soon became evident that, at the expiration of the term of Justice Jacob Rush, on March 18 of this year, 1791, and of Justice William Augustus Atlee, on August 9, there would be a recasting of the court. The new Constitution provided for the erection of circuits or districts of from three to six counties each, with a President Judge at the head of each, who should hold courts in each county with the local Associate Judges. This indicated a method of taking care of the two Justices, who had served during the stormy time, one of whom was now advanced in age. As Justice Rush's place was

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<sup>1</sup> Judge Edward Shippen resigned his post as President of the Court of Common Pleas and was commissioned to succeed Justice Bryan on the Supreme bench January 29. Prothonotary James Bidle, of Philadelphia, was promoted to Judge Shippen's place. The Supreme Court of the United States began its sessions in Philadelphia about a month later, with James Wilson as an Associate Justice. By March, Justice Wilson was designated by the House of Representatives to revise and digest the laws of Pennsylvania, but it was not done until Charles Smith was chosen to do it. The reference by Dallas is in Hamilton's report of the impeachment of Supreme Court Judges, 1805, pp. 238-9.

vacant first, it was filled by Justice Jasper Yeates on the 21st, three days after the expiration of Rush's time.

On the 13th of April, 1791, an act was passed putting into effect the provisions of the judicial features of the new Constitution. Five districts were created, and the High Court of Errors and Appeals was remodeled to embrace the Justices of the Supreme Court, the President Judges of the five judicial districts and three persons of known legal abilities.<sup>1</sup> Judge Rush was slated for one of the President Judgeships. Mr. Smith's name had been considered for various posts by his friends early in the year, and he, too, was offered one of these districts by Governor Mifflin, although he himself had nothing to do with the matter. It is probable that at this time Justice Yeates hoped to see Mr. Smith slated for Atlee's place or the Attorney-Generalship; but he seems discouraged over the prospect about this time, as he writes his wife, on April 11, that "The probability of Mr. Thomas Smith coming down amongst us is very remote, tho' I should be exceedingly pleased with his being near us."<sup>2</sup> His discouragement may have arisen from the claims that were pressed for William Bradford, Jr., who was evidently slated for some advancement, and who was made Attorney-General in June. On July 10, however, Justice Yeates wrote his son-in-law, Charles Smith, the nephew and student of Thomas Smith, of some further hopes he had, and Charles showed it to his uncle. It was evidently intended to call forth some expression, and it did:

"Charles has just shown to me the first Paragraph of your Letter to him of the 10<sup>th</sup> Instant," the letter reads, "in consequence of which permit me to communicate to you my sentiments on the subject of it, which I need not say I will do without reserve.

"Did I think myself possessed of sufficient abilities to fill the office you mention, to public satisfaction & with

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<sup>1</sup> Act of April 13, 1791. The five judicial districts were as follows: First, Philadelphia, Montgomery, Bucks and Delaware; Second, Chester, Lancaster, Dauphin and York; Third, Northampton, Berks, Luzerne and Northumberland; the Fourth, Cumberland, Franklin, Mifflin, Huntingdon and Bedford; and the Fifth, Westmoreland, Fayette, Washington and Allegheny.

<sup>2</sup> Whelen Papers. These letters indicate a warm friendship between the Smith and Yeates families which increased with the years.

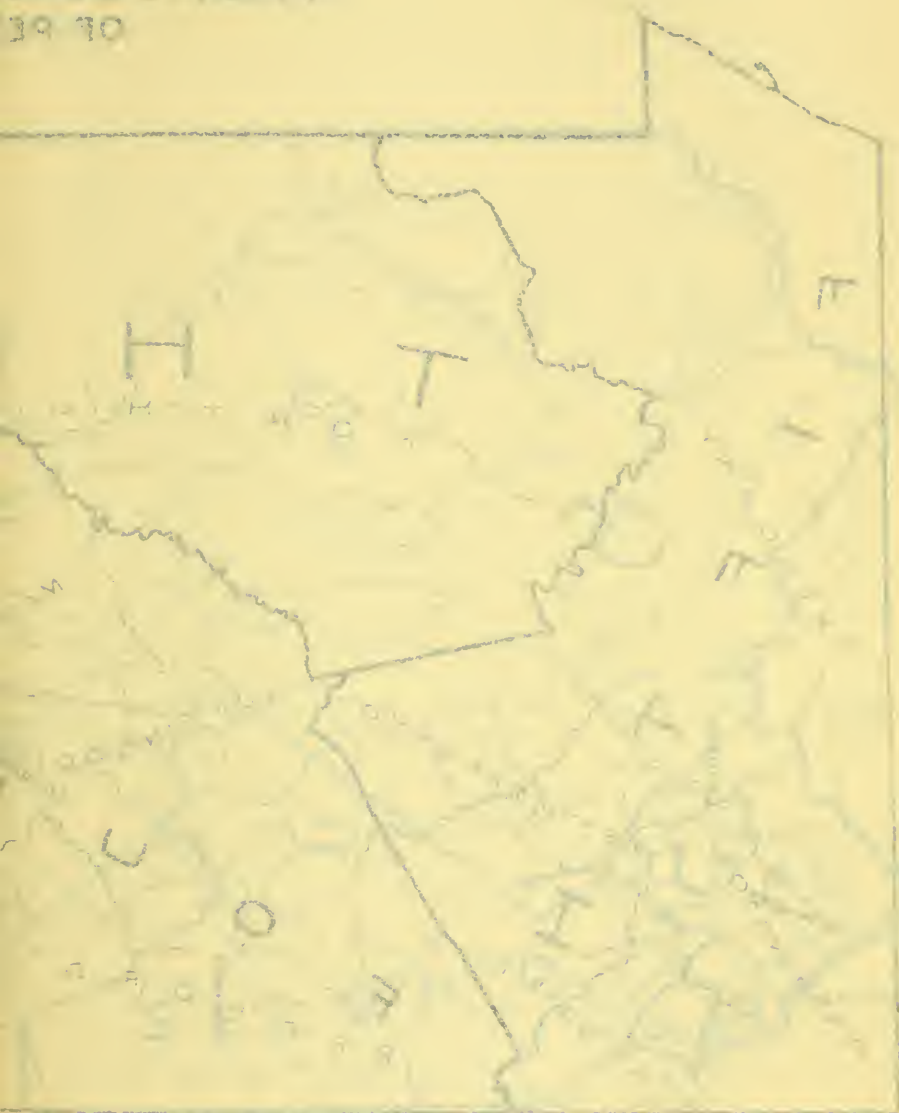
credit to myself, the objection of living in or near the city would be so far from weighing with me against accepting the appointment, that it would be an inducement in favor of it;—I mentioned to you that the greatest objection I had to accepting the District offered to me by the Governor was, that I considered myself under an implied engagement to remove soon to or near the city—before I went to the courts of *Nisi Prius*, I wrote a Letter to the Governor, mentioning this objection, among others, to my accepting the appointment to this District, which I enclosed in one to my Brother. As he will be at Lancaster about the time you receive this, he can inform you what passed in consequence of it.

“As the Governor very politely offered me a District, and signified his intention of appointing me to one which would be agreeable to me—I submit to you whether there would not be some impropriety in accepting another appointment, should he have now made such arrangements as to appoint me to such District—I am totally ignorant whether such arrangement be made or not (perhaps my Brother may know)—if they are not, I could have no difficulty on that score—if they are, I would not for the sake of any office or emolument, act a part which a man of strict honour & delicacy would condemn—besides the motives which would influence others in a similar situation, I am influenced by an additional consideration—I have argued myself into a belief that it ought to be a fundamental maxim in a Republic that no Citizen ought to solicit for any office, nor refuse any to which the suffrage of his fellow Citizens, or the choice of those entrusted with the administration, may elect or appoint him—by this maxim I have been hitherto guided—for I assure you that I never directly or indirectly since the commencement of the war, solicited any of the offices which I have filled; nor refused one to which I was chosen, although at the most gloomy periods of the war. If I am at liberty to accept the appointment mentioned by my worthy friend Mr. Lewis<sup>1</sup>—the next consideration is—are my legal

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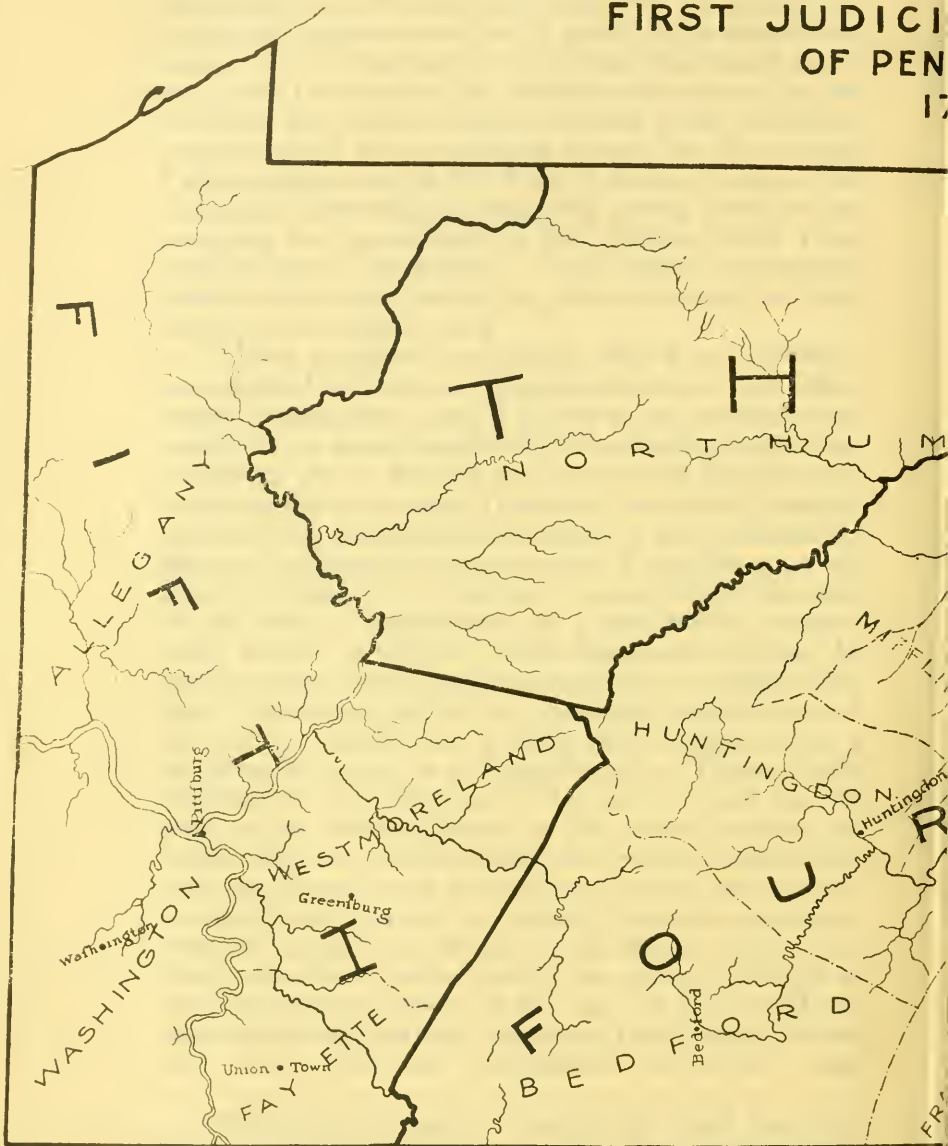
<sup>1</sup> William Lewis resigned the bench of the United States District Court for Pennsylvania some time after this, so that he thought of Mr. Smith as his successor. Judge Yeates writes his wife on January 5, 1792, “Mr. Lewis has resigned his seat as Judge of the

FIRST JUDICIAL  
OF PE





FIRST JUDICIAL  
OF PENN  
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# DISTRICTS YLVANIA





knowledge & abilities equal to it?—can I fill it with reputation?—even my own vanity does not suggest that I can—I should enter upon it with fear & trembling & should I once suppose that I had accepted an office to which I was not equal, I should feel the most poignant mortification.

“However, as you will perhaps say that this is only acting over again the old farce ‘I will not be a Bishop’—I beg leave in the most undisguised & explicit language to say—that if I am at liberty, & you & Mr. Lewis believe that my abilities are equal to the task, I will be entirely guided by your Judgment—should you be of this opinion, I request you will write a confidential Letter to Mr. Lewis on the subject, it does not seem proper that I should yet write to him, as there is no intimation that I should.—Were I in the City, I should communicate my sentiments to him with the same unreserved freedom which I now do to you, as I have also experienced his friendship, sincerity & sound judgment, excepting in the instance now under consideration, wherein I am afraid that you and he over-rate my abilities—I am far from thinking that my professional success has been owing to extensive talents—I ascribe it more, to punctuality & attention in the discharge of every trust reposed in me—to a laudable ambition not to be very far distanced in my acquaintance with professional Books—but even in this knowledge I am far short of my wish—you know that I have been so much engaged in business during the last ten years, that I have had very little time to devote to study, & you know that the studies of a Lawyer cannot be finished but with his life.

“You have always doubted my sincerity when I have mentioned that I never had a wish to amass a fortune—that I would be perfectly contented with a competency—you may perhaps give me more credit, when I assure you,

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District Court, but we know not yet who will be appointed in his place.” On the 12th of the same month, in speaking of Charles Smith in a letter to Mrs. Yeates, he says: “Tell him I have reason to hope that his Uncle [Thomas Smith] will be appointed Judge of the District Court in the room of Mr. Lewis. But this is in *confidence and must not go further*.”—Whelen Papers. It is said that Mr. Lewis was the member of the Constitutional Convention of Pennsylvania who was responsible for its judiciary plan.—The Burd Papers, p. 155.

as I now do, that the smallness of the salary would be no objection with me, as the appointment would not, I presume, oblige me to live in a style above the salary—if it does, I would by no means accept of the office—you see that I write without any order—as I expect the Post every minute—I have not time to arrange or even to form my thoughts on the occasion, much less to commit them to writing. I beg leave to rely on your previous knowledge of my sentiments, inclinations & fitness for the Station;—to which, adding what I have now written, I request you will write to Mr. Lewis in such manner as you shall judge proper.<sup>1</sup>

“I am led to believe,” he adds in closing, “that the President has, at least, as favorable an opinion of me as I desire—I had finished all the business in April, with which he had entrusted me, I sent the last of the Money in May, with a statement of the whole. Just as I had written half the first line of this—I had the honour of a Letter from him in warm terms of approbation indeed.—I have been honoured with much correspondence with him during the course of the business in which I have, as well as verbally, received his approbation.”<sup>2</sup>

Within two weeks after this letter Mr. Smith was in Philadelphia and it is believed that his friends thought there was a possibility of the post of Attorney-General of the United States for him. The Supreme Court, which had only been organized a few months, was then in session, and Mr. Bradford, Attorney-General of the State, seemed to be as much interested in it as any one. On August 2, they appeared at the National Supreme Court room in the City Hall, and there, before that high tribunal, Mr. Bradford made the motion and Mr. Smith was admitted to its bar. This project, if such there was, was not destined to succeed for some unknown reason, as Governor Mifflin was not inclined to give up his program for these gentlemen.

The high opinion of Mr. Smith held by Judge Yeates

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<sup>1</sup> Judge Yeates had evidently asked him to make the application himself.

<sup>2</sup> Collection of Letters of Thomas Smith, in the possession of D. McN. Stauffer, Esq., Yonkers, N. Y. These letters are almost entirely confined to the period of his service on the bench. This one is dated Carlisle, July 18, 1791, eight days after Charles Smith's interview.

was often shown in many ways, among them being quotations of his sayings. About a month after the above letter was written, August 13, to be exact, he writes to Mrs. Yeates: "I stick close to my writing & go no further than Mr. Smith's—'rise early, sit up late & eat the Bread of Carefulness,'"<sup>1</sup> and, as has been seen, he was much interested to see him in a position worthy of his abilities. Governor Mifflin, however, wished him for the President Judgeship of the fourth of the newly created first five districts, and issued his commission on August 20 (1791),<sup>2</sup> and it was announced, among other papers, in the *Independent Gazetteer* of August 27, that William Bradford, Jr., was appointed to the Supreme Bench, that Jared Ingersoll had been given his place as Attorney-General of the State, and that the President Judgeships had been assigned as follows: To the First, Hon. James Biddle; to the Second, ex-Justice William Augustus Atlee; the Third, ex-Justice Jacob Rush, a brother of Dr. Benjamin Rush; to the Fourth, Hon. Thomas Smith, and to the Fifth, Hon. Alexander Addison.<sup>3</sup> These were all strong and eminent men;

<sup>1</sup> The Whelen Papers.

<sup>2</sup> The commission is preserved among the De Renne Papers. On the back the various Recorders vouch for its being recorded as follows: At Carlisle on September 1, 1791 (Book I, Vol. I, p. 521); at Huntingdon, September 5 (Book B, p. 88); at Chambersburg, September 13 (Book B, p. 323); at Bedford, October 12 (Book C, p. 496), and at Lewistown, December 12 (Book A, p. 146). The seal has on the reverse side the famous "Both Can't Survive" emblem.

<sup>3</sup> Judge Smith was a friend of Addison, who was also a Scotchman. In a letter of June 17, 1793, to Dr. Peter Smith he makes this interesting comment on him: "\* \* \* Alexander Addison, Esq., who came from Banf, or rather I think from a town nearer the mouth of Doern: he has been a very lucky fellow indeed—he came into this country with Dr. Nesbit about 8 or 9 years ago; being educated at Aberdeen for a Presbyterian clergyman—he was not ordained but was licensed to Preach by a Presbytery over the Mountains, and settled there to his satisfaction—but because he was liberal in his sentiments—the bigoted and narrow minded Presbytery refused to ordain him, though the people were pleased; and having sent to the place of his nativity for the Lady to whom he was engaged, & the charge of a family coming on, the wretches sought to starve him into hypocrisy; but having a vigorous mind, he betook himself to the study of the Law with the utmost diligence, under the direction of a gentleman of eminence—having a clear and logical head, he soon made progress—the gentlemen of the Bar seeing & feeling for his situation, took him by the hand & on our joint recommendation, he was, on my motion, admitted an attorney, in consequence of which he was soon chosen a member of the Con-



Judge Atlee was getting somewhat advanced in years, but the rest were in their prime.

Judge Smith was now almost exactly forty-six years of age and his equipment for the post unquestioned. His wisdom and his conscientiousness, as well as his excellent preparation in land law, made him peculiarly fitted for the work of the Common Pleas Court at a time when higher standards of learning in the law were being established. The districts of Pennsylvania have never had a more uniformly strong set of Presidents than at this period. Of Judge Smith, his latest successor at the head of the Cumberland courts, Hon. Edward W. Biddle, says: "Thomas Smith was both talented and industrious, and after a careful study of the careers of the long line of judges who have succeeded him in this district, I cannot name one whom I deem to have been his superior."<sup>1</sup>

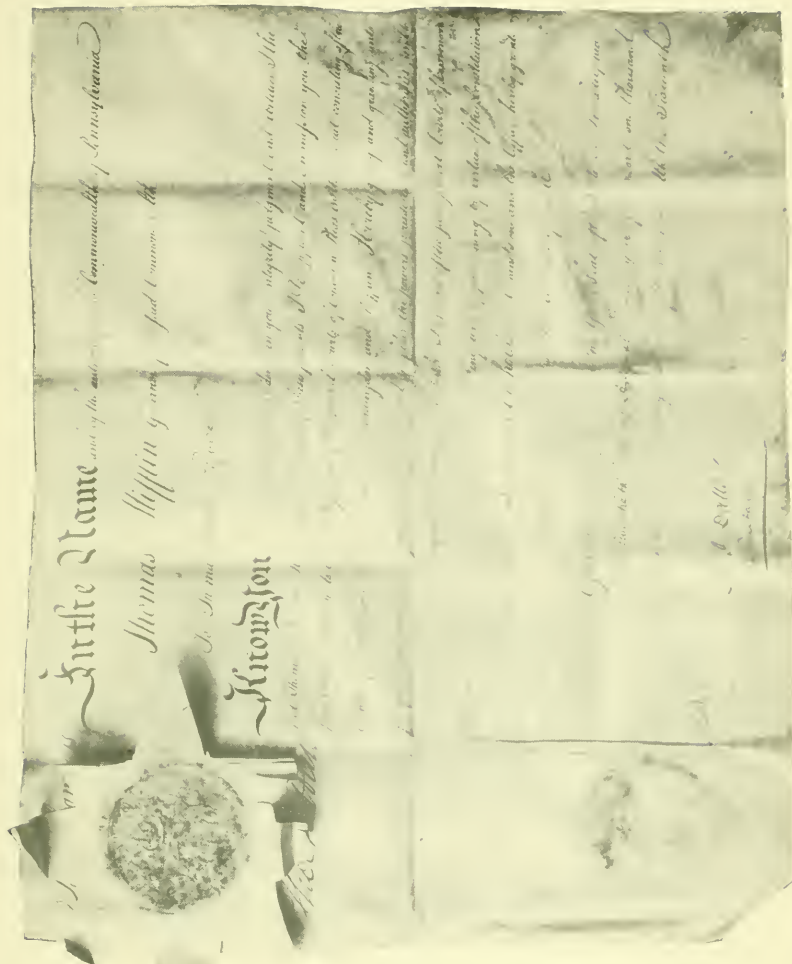
The family of Judge Smith had grown apace in three years at Carlisle also. In addition to his daughter Eliza, three other children had been born—all girls. Maria was born on May 10, 1784, and on November 10, 1787, one came who was given the name Williamina Elizabeth. To this group of children of nine, seven and four years respectively, there had been added another on December 8, 1789, Juliana, now a babe not two years old. Like most men without homes of their own for much of their earlier years, Judge Smith was intensely devoted to his, and the time had now come when the amount of absence from it, caused by his great practice, could be reduced. The court at Carlisle had far the larger business of the then five large counties of the Fourth District; all of them were accessible with comparative ease for those days, so that he was at no time long absent from home, or far from it when he was absent. For while his district covered the vast territory now included in Cumberland, Franklin, Perry, Juniata, a large part of Mifflin, most of Centre, part of Clinton, half of Clearfield, Huntingdon, Blair, Cambria, Somerset, Bed-

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vention where he distinguished himself—He is now President of the Courts over the Mountains, with a salary of £500 a year, our money, whereas had he proceeded in his first views, he would have hardly expected £150. I mention him as an example of diligence & perseverance, aided by a proper education, strength of mind & prudent deportment."—De Renne Papers.

<sup>1</sup>Letter to the author, dated June 15, 1903.





Thomas Smith's Commission as President Judge in 1791.  
in possession of W. J. De Renne, Esq., Savannah  
Half-tone reduced



ford and Fulton—nearly a fourth of the State, the only places he was compelled to hold court were Carlisle, Lewistown, Huntingdon, Bedford and Chambersburg. In population, Judge Smith's was the smallest of the five districts, containing about 56,000 people, while Judge Atlee's district contained over 120,000.<sup>1</sup> In fact, the Fourth District was about the size of the present Beaver district. This division was so natural that it remained unchanged in number for about fifteen years.

Judge Smith received his commission before September 1 (1791), on which date he had it recorded at Carlisle while the court was in session, although there is no evidence that he took his seat that term, which closed on the 27th of the month.<sup>2</sup> He seems to have gone directly to Huntingdon, where his commission was recorded on the 5th of September. Here were some of the earliest scenes of his surveys in 1768 about the old standing stone—twenty-three years before. The court had only been organized in March, 1789, scarcely two years before, and while his former student, Charles Smith, already had considerable practice there, the Judge seems never to have had any. It was the first Tuesday in September, and as there was no court house yet, the courts, which at first had been directed to be held at Ludwig Sells' house, were held in a tavern kept by a Mrs. Haines, down on what is now Allegheny avenue, in the region east of the present depot and facing the river. It was not uncommon in such cases to divide the tavern barroom into two parts with a pole, thus making a "bar" at both ends of the room. Here were gathered Attorneys Hamilton, Brown, Biddle, Cadwallader, Walker, Nagle, Orbison and Patterson—most of whom had

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<sup>1</sup> The Fifth was next, with about 63,000; the Third followed, with over 76,000; then came the Philadelphia district, with over 112,000, and lastly the largest, the Second, or Lancaster district, with over 120,000. Those were days when Philadelphia county had only about 54,000 people and the entire State but 434,373. There are now fifty-six districts.

<sup>2</sup> His oath of office, taken the same day and signed, was: "I, Thomas Smith, Esquire, do swear that I will support the Constitution of the United States and the Constitution of this Commonwealth of Pennsylvania: and that I will perform the duties of my office of President of the several Courts of Common Pleas in the circuit consisting of the counties of Cumberland, Franklin, Bedford, Huntingdon and Mifflin with fidelity. Thomas Smith."

often felt the force of the judge as an antagonist before the bar. There were but twenty cases on the continuance docket, the only one then kept there, so the session was to be short. Hamilton, Cadwallader, Biddle and Brown had most of these. Judge Smith and Associate Justice John Canan were on the bench. Among the auditors on one occasion, possibly on this one, it is said, there was a chain-carrier, Pat Leonard by name, who had served with the Judge in his surveyor days in all the intimate familiarity of camping out together in wild, new territory for weeks at a time. Pat had evidently found "Tom" Smith a good fellow and appreciated his new honors, although not the dignities which the Judge conceived belonged to the bench of justice. So just as the Judge was about to charge the jury Pat made his way to the farther "bar," secured a bowl of punch, and, making for the bench with it in the easy familiarity of the old days, he accosted the Judge with: "Here, Tom, take a bleer of this before you charge the jury!" The astonished son of Erin was instantly charged with contempt of court, and ordered to the little puncheon jail near at hand to meditate for a few hours on the difference between a transit and the scales of justice.<sup>1</sup>

From here he seems to have returned home and gone to Chambersburg, Franklin county, where his commission was recorded on September 13, but the destruction of the records of that court, previously mentioned, prevents any view of his work there. On the second Tuesday in October, however, he and his associates opened court on the second floor of the old stone court house of 1774, at Bedford, which had been the scene of so much of his varied experience since his settlement there over a score of years before. There were a few more cases here than at Huntingdon—twenty-nine in all—and many of the same lawyers. Woods and Nagle had the greater number of cases, and there were St. Clair, Riddle, Charles Smith, who no doubt took some of his uncle's former practice; Dunlop, Hamilton and Riddle, who was to succeed Judge Smith in the near future. The session was short.

"At a County Court of Common Pleas held at Carlisle

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<sup>1</sup> Centennial History of the Bench and Bar of Huntingdon County, by Theodore H. Cremer, p. 5, 1887.

for the County of Cumberland the nineteenth day of October," reads the docket of the first court held at his home town, Judge Smith addressed the grand jury and the officers of the court, adding: "Let us conclude, by impressing on the minds of all our fellow-citizens, of every class, whose duty it is to attend at court, that it is only by our united exertions, in practical, diligent and faithful discharge of the duties of our several stations, that the real dignity of the court can be supported and justice administered to the satisfaction of the public." As one of the attorneys then said: "May it please your Honors"—intending to make a motion, the Judge requested him to postpone it a moment. "The gentlemen of the Bar," said he, "frequently use this expression in addressing this court; but the appellation not being given to us by the Constitution or Laws of the Country, it will be agreeable to the court if you decline giving it in future. The expression 'This Honourable Court' has indeed crept into one of the Acts of our Assembly;—should that form of address be used in other circuits, we shall not say that it is improper. For, as on the one hand, it would be false modesty or rather false pride, under the mark of modesty to refuse any titles given by the Constitution or the Laws; so on the other, it would disclose uninformed minds, should we arrogate to ourselves appellations not given by either. If we possess sufficient legal abilities and an intimate and accurate knowledge of the practice:—if we administer the Laws with decision, dispatch and rigid integrity:—if we consult and promote the real permanent interests, and social happiness of our fellow-citizens, as far as in our power in our present station, they will respect us without any titles: But should we appear unequal to our office—should we betray the want of legal abilities, or should our judgments be bad or influenced by our affections, or passions, or by any personal or party considerations, no titles or appellations, however pompous, could secure to us the respect of an enlightened people.

"We beg leave on this occasion," he continued, "to point out another impropriety, of which I was guilty as any of you when I was at the Bar, although I scarcely ever was in the other instance:—the gentlemen, in whose favour the court gave judgment, generally rise and *thank the*

*court*. We request that you will discontinue this practice; were the counsel on the other side to say, *we blame the court*, the expression would certainly be thought improper—the one indeed flows from politeness, the other would be looked upon as rude; in every other point of view they are equally exceptionable. We must give judgment according to Law—we could not give it otherwise than we do, to gain the applause or to shun the censure of millions. We must be actuated by considerations infinitely higher than the applause or censure of men. God forbid that any of the parties in this court, or in any other courts I sit, should ever have it in his power to say, with truth, either that he has a *friend* or an enemy on the Bench.”<sup>1</sup>

Judge Smith and his associates, who were Justices of the Peace, opened the session with a case in which Robert and Thomas Duncan were opposing attorneys. Watts and Creigh had the most cases, and the fourth was a suit for Judge Yeates, conducted by Charles Smith, with Thomas Duncan for the defendant. It was a long session, with eighty-three cases on the docket—two of them being cases in which the Judge himself had been attorney. The lawyers were all readmitted—James Riddle, Andrew Dunlop, Thomas Hartley, David Watts, Thomas Nisbett, Ralph Bowie, Thomas Duncan, Thomas Creigh, Robert Duncan, Jonathan Walker, Charles Smith, George Fisher, James Hamilton, David McKeehan, James Smith, Joseph Hubley and James Hunter. Thomas Duncan had the largest practice, although it must be admitted Hamilton and Watts were not so far behind. Duncan afterward became a member of the Supreme Court, succeeding Judge Yeates. This was a long session, and must have lasted nearly into December.

The next court, for some reason, was held on the first Tuesday in December, 1791, at Huntingdon, but it was a short session, and may have been called in order to allow a more continuous session at Lewistown, Mifflin county, where certain local members of the bench were getting into trouble. Richard Smith, a nephew of the Judge, was admitted at this court on the examination of Messrs.

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<sup>1</sup> The *Carlisle Gazette* and the *Western Repository of Knowledge* of October 26, 1791.



Riddle and Hamilton. There were but twenty-one cases. Justices David Stewart, Hugh Davidson, Robert Galbraith and Benjamin Elliot sat with Judge Smith. Cadwallader had more cases than any one else, and young Smith had no fewer than eight. Hamilton, Brown and Riddle had rather more than the rest. Samuel Riddle was admitted.

During the cold days of mid-December Judge Smith started for Lewistown, down the Juniata, where the Mifflin courts, as has been said, were in trouble. If the visitor to that beautiful region now will glance at the present county prison and imagine a two-story dressed-log structure taking its place, the doors facing on the cross-street, he will have some idea of the structure which was erected in 1790, the year before, for a combined court house and prison, the lower story in such cases being the prison.<sup>1</sup> This old building came very nearly being the scene of a bloody riot the term before, the first term under the new commissions, and one which the new President Judge had not attended. The affair was a relic of the war. It seems that one of the newly appointed Associate Justices was the ex-County Lieutenant of the Revolution, Samuel Bryson, who, it was claimed, had refused to commission two Colonels elected by their respective regiments. When, on September 12 (1791), three of the Associate Judges met and organized the court, the members of these two regiments determined that Mr. Bryson should not serve on the bench. The next day they assembled in arms on the Juniata and, under the direction of Wilson, a brother of the Sheriff, marched on the court. Judge James Armstrong met them on the stairway and exclaimed: "You d——d rascals, come on! We will defend the court ourselves, and before you shall take Judge Bryson you shall kill me and many others, which seems to be your intention and which you may do." A parley, however, conducted largely by the Deputy State Attorney, John Clarke, led to a compromise, by which Judge Bryson was to leave the court for the present term and the rioters were to

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<sup>1</sup> The structure stood until about 1802. The courts were held in it, however, but a short time after the close of Judge Smith's service. The view of it here given is from a cut published in the *Lewistown Gazette*.

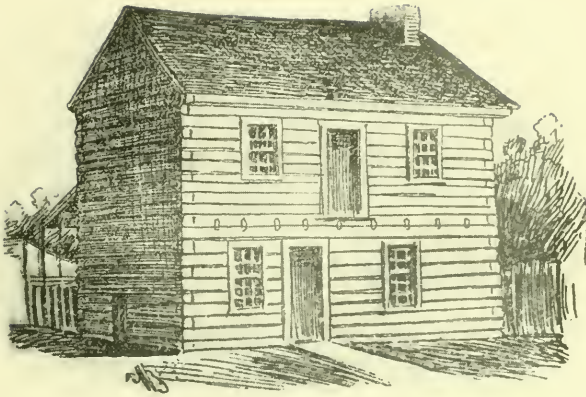
petition the Governor. The Sheriff himself had to be locked up, at the order of the court, in the prison-room below, and another riot was threatened to release him, when a compromise was effected by letting him out. A regiment under Colonel McFarland came to town and offered to defend the court. One element of the difficulty was that one of the Justices, Judge Beale, refused to sit on the same bench with Judge Bryson, but the court finally finished its business and adjourned. The proposed collection of the tax on spirits made the rioters still more hard to deal with, but with the close of the court the matter was quiet until the next term.<sup>1</sup>

These troubles were taken into court at the December term, and it made so busy a session, with the other work, that it ran, by adjournment, into January, 1792. There were sixty-three cases in all. The case of the State against George Wilson, Thomas Beale and Thomas Wilson was handled by Hamilton for the former and Duncan for the defense, and the one brought by Samuel Bryson against George Wilson was tried by the same attorneys, with Nesbit aiding the prosecution. Practice was pretty well scattered at this session; Walker, Anderson, Hamilton, Duncan, Nesbit, Patterson, Cadwallader, Robert Duncan, Fisher, Clarke and Watts were all about equally busy. Judge Smith did not sit at the adjourned session.

It is not clear just when the Franklin courts at Chambersburg were held, but the schedule seems to have been Carlisle, Huntingdon, Bedford, Chambersburg and Lewis-town, except when work was too great at Carlisle. At any rate, the courts at Carlisle were held the first Monday in January, 1792, before Judge Smith and his associates, with no fewer than eighty-eight cases on the docket. It was plain that the Associate Justices at Huntingdon would have to hold the court called for the third Monday in that

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<sup>1</sup> From an account of the affair by the Deputy State's Attorney in "The Susquehanna and Juniata Valleys, Pennsylvania," Vol. I, p. 461. The introduction to the letter is inaccurate in stating that this occurred at the last court under the old order, or that Judge Smith was soon after appointed President Judge. It was the first term under the new order, and Judge Smith had been appointed, as has been seen, some time before this court met; but he did not meet with them at this session.



COURT HOUSE AT LEWISTOWN  
in which Thomas Smith sat as Judge



month alone, and they did.<sup>1</sup> Thomas Duncan had a tremendous practice at Carlisle, being actually engaged in forty-eight out of the eighty-eight cases. Hamilton came next with twenty-eight, while Watts, Charles Smith, Dunlop, Sample, Hubley, Fisher, Robert Duncan, McKeehan, Creigh, Riddle and Walker were also busy.

On the fourth Monday in January he was in Bedford, holding court in the second story of the old stone building. There were but fifteen cases before him and his associates, and these were divided pretty evenly between Nagle, Cadwallader, Hamilton, Biddle and Woods. One peculiarity of the records of this court is that they appear to be in the hand of the Judge himself. "Owing to the fact," says his latest resident successor, Hon. J. H. Longenecker, "that in the years of his term in this district our county was so newly and sparsely settled, the volume of litigation was not great, and it generally involved land disputes. Ejectment was by far the most frequent form of action. This is a branch in which Judge Smith appears to have been peculiarly well equipped. All business of the courts, civil and criminal, seems to have been quickly dispatched and the dockets promptly cleared in Judge Smith's time, and I infer from the information which can now be gathered in a search of the records, that he was not only a jurist of superior legal attainments, but that he presided over his courts with fine executive ability and tact. One cannot look for an hour over the records of cases tried during that time without realizing that there was a thoroughly competent and efficient Judge on the bench."<sup>2</sup> Judge Smith did not return for the next term, but left the cases to his associates, because of the amount of business at Carlisle and Lewistown.

Omitting the Franklin courts, which probably came next, the President Judge held his next court at Carlisle, where the great number of one hundred and thirteen cases awaited it. Thomas Duncan had far the larger number of cases, as usual, and the bar was much the same as before, except in the admission of James Duncan and Thomas Elder. Some of this work must have been left to his asso-

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<sup>1</sup> There were only seventeen cases, and Cadwallader had the most of them.

<sup>2</sup> In a letter to the author.

ciates, for on the 10th of April he opened the court at Lewistown, where there were seventy-one cases entered.<sup>1</sup> It was evident that Carlisle and Lewistown courts led in amount of practice, omitting Chambersburg, of which we have no record. At this time there were an unusual number of important cases engaging several lawyers; Hamilton and Anderson were arrayed against Thomas and Robert Duncan and Patterson in several cases, as were Walker and the two Duncans against Nesbit, Hamilton and Cadwallader. Patterson, Watts, Nesbit, Ingersoll and Anderson were especially busy men. So, indeed, were Watts, Richard Smith and others. Judge Smith must also have left much of this work to his associates, for he was at Huntingdon the third Monday in April with a full court and thirty-one cases before them. Cadwallader and Richard Smith had more cases than other lawyers, although Hamilton was a close third.

The August terms found him in all the courts. Those at Carlisle opened on the first Monday, with a docket of one hundred and forty cases—the largest list yet before him. Of course, Duncan led, as usual, but there was plenty of business for them all, and some new names besides. J. A. Hanna appears, and Kittera, Graydon, Carpenter, Wallace and George Smith. The 14th of August he was at Lewistown, and the forty-six cases necessitated an adjourned court, which Associate Judges Armstrong and Bryson held in September. These cases were well distributed among a large number of the old attorneys. On the third Monday he was at Huntingdon, where the docket was larger than usual—fifty-five cases. Richard Smith was growing in prominence at this bar, but nearly all the lawyers of the district had cases this time, except the Duncans: Ingersoll, Cadwallader, Walker, Hamilton,

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<sup>1</sup> On April 8 he wrote Judge Jasper Yeates, in which he says: "The sun is up—it is a beautiful morning—I am just going to set off for Mifflin court." It is evident, according to this letter, that Charles Smith was taking the practice of Judge Yeates, for Judge Smith says of him, he ought to get up earlier, as should one of Judge Yeates' old-time German clients find it out, he would say: "Mashter Yeates til nefer lie in ped so long unless when he hat been playing carts or ——— te last night." Judges Smith and Yeates were quite accustomed to this badinage with one another. He added some in the same line on the infection of the desire abroad to speculate in bank stock.



Riddle, Orbison and Brown. Clark, Robert Duncan and Thomas Nesbit were admitted. On the fourth Monday of August he was at Bedford, and it was becoming more and more evident that most of the lawyers of the district practiced in each court. Henry Woods had almost as good a practice as Justice George Woods once had, and Nagle had more cases here than elsewhere in the district, but Hamilton, Riddle, Dunlop and Cadwallader had about as large a proportion of the thirty-seven cases on the docket.

The fall terms began with a full court at Carlisle the first Monday of October. There were eighty-three cases before them, and, from the number in which a certain family appears, it could properly be called a Duncan court, for Thomas, Robert and James Duncan had a large proportion of the cases. Watts and Hamilton came next, and Charles Smith and others had a fair share. In November there were thirty-six cases at Huntingdon, and the courts at Lewistown and Bedford were full. A letter, dated about this time and written to A. J. Dallas, Secretary of the Commonwealth, refers to a case before him and says of a certain man: "He has too much sense to expect that I can so far overlook the duty which I owe to the station in which I am placed, as to decline prosecuting the defendant, even if he were my own son."<sup>1</sup>

Among the few references to precedents established in Judge Smith's courts is the following interesting one from Justice Charles Huston of the Supreme Court: "When I was reading under the late Judge Duncan, we had no book on the laws of this state, but 1 Dallas Reports. I was very anxious, among other things, to learn something of our practice. Thomas Smith, Esq., afterwards a Justice of the Supreme Court, was President Judge at Carlisle. I understood that while justices of the peace presided in the Common Pleas, there had been a difficulty as to opening judgments confessed on warrants of attorney. He established the practice that on an affidavit of the defendant stating a fact or facts, which if true amounted to a defense to the whole or part of the judgment, and concluding that there was a just defense to the

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<sup>1</sup> The Gratz Collection. Dated October 9, 1792.

whole or part, a rule to show cause why the judgment should not be opened must be granted; and if the facts were proved by a disinterested witness, the judgment must be opened; and no contradicting evidence was to be received, because the court could not decide on disputed facts—for this purpose a jury was absolutely necessary. After I was admitted to the bar, I practiced under Judge Rush, Judge Riddle, and Judge Walker; and presided as judge nine years, and never knew of any other doctrine in that district.”<sup>1</sup>

Late in this year, 1792, came the beginning of trouble in central and western Pennsylvania over the tax on whiskey, which culminated in the rebellion two years later. Governor Mifflin had written Judge Smith about it, enclosing the President's proclamation, and on December 10 he sent the following reply: “I received your letter of the 5<sup>th</sup> of October, inclosing the Proclamation of the President, respecting the proceedings contravening the Laws for raising a revenue from spirits distilled within the United States. I did not think it necessary, merely to acknowledge the receipt, till I could inform you what I had done in consequence of it.

“I take it for granted that you did me the honour of writing to me, rather from your warm attention to the welfare of this State, in particular, and of the United States, than from any apprehensions that I am not fully convinced of the necessity of inculcating on the minds of the people, the indispensable duty of obedience to the Constitutional Laws of the Union and of this State. So firmly convinced am I that the lasting happiness of the people in every State, and the duration of the Union, depend essentially on a due obedience to the Laws, especially in this early period of our national existence, that I should have been guilty of a criminal inattention to both, had I not, on every proper occasion, since my appointment to my present office, inculcated this duty as indispensable, without the performance of which, our liberties cannot be preserved. Under this impression, I have hitherto acted according to the best of my judgment and abilities.

“I had nearly finished writing the introduction to the

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<sup>1</sup> Watts and Sergeant, 284.

technical part of my charge to the Grand Jury, for the November Term, when I received your letter; although I had anticipated, in substance, your recommendation in that, and in every other charge which I have hitherto given, yet I was led by duty, and perhaps by a little vanity, to introduce an extract from that letter; because the sentiments of the President of the United States, and those of the Governor of this State, coinciding with those I had delivered, would give mine a weight which would claim much greater attention from those to whom they had been addressed and from the good people in the circuit in general,<sup>1</sup> than of themselves, they would deserve. I also esteem it not a little honour to myself, in having anticipated the sentiments of two such distinguished characters, one of whom deservedly enjoys the confidence of the People throughout the Union, and the other, that of the citizens of Pennsylvania.

"By the appointment of Dr. Armstrong to Congress," he continues, "I shall lose a valuable associate in Mifflin county; possessing firmness, honour and strict integrity, invested with a sound judgment, he contributed not a little to restore and preserve peace and good order in that county. I am afraid it will be difficult for you to appoint another of equal worth to succeed him. I have heard Col. Patton mentioned; I have not the pleasure of a personal acquaintance with the Gentleman, but from the character which I have uniformly heard of him, I would not wish a better man. \* \* \* ."<sup>2</sup>

Enough has been said to indicate the character of Judge Smith's various courts in amount of practice and the personnel of the various bars. The business of 1793 was even heavier than before, but there were no essential changes in the character or personnel of the practice. There were usually above a hundred cases at Carlisle, and eighty at the January term of 1794, the last of his service on that bench. Unfortunately, but one of his

<sup>1</sup> Pennsylvania Archives, Second Series, Vol. IV, p. 46. The tax on all distilled spirits under the law of Congress of March 3, 1791, drew forth a public meeting for protest at Redstone, Old Fort, the following July 27. The difficulties continued until the Rebellion early in 1794.

<sup>2</sup> The Gratz Collection. Dated October 9, 1792.

charges, and none of his opinions on this bench, have come down to us, as there have been in the case of Judge Rush; but it is sufficient that leaders like Judge Yeates and others looked upon this position as but temporary, and upon him as fitted for a seat in a United States Court or the State Supreme bench.

During this period, it must not be forgotten, he was not only President Judge of the Fourth District, but was, by virtue of that position, a member of the highest tribunal in the commonwealth, higher even than the Supreme Court itself. This was the High Court of Errors and Appeals—a last court of appeal—which was conceived necessary after the Revolution began, to take the place of appeal to the King in Council. At its creation in 1780, it had included the President of the State, the Judge of Admiralty, the members of the Supreme Court and “three persons of known integrity and ability”—which soon meant, so far as two were concerned, such men as Henry Wynkoop of Bucks and Samuel Miles of Philadelphia. When the Constitution of 1790 came to deal with this court, however, some important changes became necessary. None of its members were retained except Chief Justice Thomas McKean, who had been a part of it from the first, and Judges Shippen and Rush. The separation of the executive and judicial functions in the new Constitution prevented the Governor being a member as before, and as admiralty matters were now national, the Judge of that court was not included. So the Constitution provided that the High Court should consist of members of the Supreme Court, President Judges of the five judicial districts and “three persons of known legal abilities.” The new court met, as the law provided, in Philadelphia, on November 1, 1791, for that year’s session. Heretofore the executive of the State had been the presiding officer, although, in fact, Chief Justice McKean had presided at all but four sessions ever since 1785. It was now desired to emphasize the appeal character of this court as more distinctly above the Supreme Court, and in order to do so a distinguished “person of known legal abilities” was elevated to the Presidency of it, namely, the well-known ex-Chief Justice of antebellum days, Benjamin Chew. This first session of the court saw present only President Chew, Chief Justice Mc-



THE HIGH COURT OF ERRORS AND APPEALS OF PENNSYLVANIA IN 1791  
except Judge Jacob Rush





Kean, Justices Shippen and Bradford, and one President Judge, James Biddle of Philadelphia. Judge Smith was not present at this session, nor at that beginning March 30, 1792, but when the court opened July 9 of that year at the State House, Judge Smith was present in the largest court, probably, that had ever assembled in the commonwealth. There were President Chew, Chief Justice McKean, Justices Shippen and Bradford and President Judges Biddle, Rush, Smith and Addison. There is every probability that this court sat in the Supreme Court room—the west lower room of the State House, where they sat in 1787, and as we know they sat in this building in January of this year, there is little doubt that it was in this same room, the one in which Judge Smith had experienced so many of the most important events of his life.<sup>1</sup> Before the court appeared such men as Tilghman and Duponceau. The session lasted from July 9 to the 13th, inclusive.

In a letter to a gentleman in Baltimore, dated May 17, 1792, Judge Smith, after speaking of his own illness from a siege of influenza, says: "I am to inform you that the High Court of Errors and Appeals met agreeably to the special act of Assembly, which I mentioned in my last; but could not make a court in this cause, because Mr. Yeates & Mr. Bradford had been Counsel and could not sit, & the Presidents of the Circuit did not attend—had I attended I could not have sat as Judge, as I had been Counsel below.—The stated time of holding that Court is the 2<sup>nd</sup> Monday in July—at that time the Presidents of all the Circuits will attend—two of them having been Judges of the Supreme Court,<sup>2</sup> were Judges of the High Court of Errors & Appeals when this cause was before argued before that Court.—Had not such uncommon delays happened in this cause, I could almost venture to assure you that it will be [decided?] then; but I will only

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<sup>1</sup> January 10, 1792, Judge Yeates wrote his wife: "I write you in Court surrounded by a multitude of merchants. Tho' personally in the State House on a Bench of Justice, my Feelings and Affections rest in your Parlors. I am carried beyond myself and I think I shall never much mend as a Judge in this particular."—Whelen Papers. It is a happy conception which is now making this room the seat of a collection of portraits of the Justices of the Supreme Court who sat in the old State House.

<sup>2</sup> Judges Atlee and Rush.

say that I intend to be at that Court although I do not choose to sit in this Cause—either I or Mr. Lewis will give you immediate notice of the result from thence.”<sup>1</sup>

After that year and a session in January, 1793, the Court confined itself for some time to the July sessions, the only ones which Judge Smith attended up to 1794. Up to that time, too, there were no changes in the legal membership of the court, except by the death of Judge Atlee, September 9, 1793; although, in fact, he did not attend at all after he became President Judge of the Second District. The session which began July 8 of this year, '93, was the last one Judge Smith attended by virtue of his being a President Judge; and it happens to be the one in which occurred the earliest opinion delivered by him, which has been preserved. While it is not the purpose here to consider Judge Smith's work on the bench of any court, and especially on those of the higher courts, as represented by the comparatively small number of about eighty expressions, opinions or charges that have come down to us, in a technical or professional way, there may be seen by a glance at certain parts of a few of them in the proper place certain interesting mental, moral and other characteristics of the distinguished Judge.

It was not uncommon in those days for the various members of the bench of the higher courts to each give full expression of his opinions. In this case,<sup>2</sup> which came before the High Court from the Supreme Court, where it was argued by Moylan, Mifflin, Ingersoll and Lewis on the one side and Duponceau, Coxe, Sergeant and Rawle for the defendants in error, there were very full opinions given by Chew, Biddle, Rush, Smith and Addison, Judge Smith's, shorter than some of them, occupying nearly twelve pages. The case referred to the course taken by a captain of a wrecked vessel in regard to a quantity of silver, before the old Court of Admiralty in Judge Francis Hopkinson's time. "By the laws of nations," says Judge Smith, in answer to the claim that the Admiralty Court had no jurisdiction, "one nation is bound to perform those duties and offices of humanity to another

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<sup>1</sup> Letter in the Charles Roberts Collection at Haverford College.

<sup>2</sup> *Lacaze et al. vs. Pennsylvania*, to use of Lanoix. 1 Addison, 53.

nation (and consequently to the individuals composing it) which the safety and advantage of that society require. These duties of humanity are to be performed by the State toward strangers. But if the law of nations antecedent to treaties should be supposed not expressly to inculcate this principle nor require one nation to perform this duty to another, it is enforced by the 18<sup>th</sup> article of the treaty of amity and commerce between the United States and France," quoting the reference. To this he adds reference to those of the United Netherlands and Sweden, continuing with "The article above recited in the treaty with France must be construed to be as extensive in this instance as the enumerated articles in the treaties with the United Netherlands and Sweden. At least a narrower construction would have a very ungracious sound in European ears, and would be, in fact, contrary to the law of nations and to the spirit of that treaty made with us by our first and best friend, by whose friendship our national existence was preserved.

"The nation being, then," he continues, "bound by the spirit of the treaty and the law of nations to give this assistance and relief, how can it give them but through its courts, and which court so proper to take cognizance of this maritime transaction as the Court of Admiralty? Was not this court therefore bound, upon demand of the Captain, to take charge and cognizance of the silver so saved? If the Admiralty be the most proper court by which this office and duty of humanity, this article of the treaty can be performed, it necessarily follows that this court can take stipulations from the parties to perform all legal and necessary orders and decrees which it may make in the performance of its duty—the exercise of the jurisdiction with which it is for this purpose necessarily invested, and the common & law courts have no right to prohibit it from enforcing its sentence. \* \* \* The parties came voluntarily into the Court of Admiralty, and on entering into the stipulation obtained the silver, and surely they shall not be permitted to deny the effect of that engagement of which they have reaped the fruits."<sup>1</sup> It is interesting to add that this court, made up of President Chew

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<sup>1</sup> 1 Addison (Morris edition), 84.

and nearly all the heads of the district courts, sustained the Supreme Court, which was by no means always the case.

The High Court of Errors, at this period, was a large one, because some members of it were liable to have been concerned in such great cases as came before it, either as counsel or Judge. It was undoubtedly one of the strongest and ablest courts Pennsylvania ever had. The United States took from it in January, 1794, an Attorney-General, a brilliant young Justice of the Supreme Court, not yet forty years of age. Judge William Bradford was a graduate of Princeton and a law student of Justice Edward Shippen. He was not strong in body, however, and had had to resign a Colonelcy in the army on that account in 1779. He had scarcely been a year at the bar of the Supreme Court when he entered upon a service of nearly a dozen years as Attorney-General of the State. It was undoubtedly only this brilliant career that placed him on the Supreme Bench and High Court of Errors and Appeals in 1791, at the early age of thirty-six years, instead of Thomas Smith himself. While in this position, in 1792, he prepared, at the request of the Governor, a paper on the death penalty in Pennsylvania, which had wide influence on the law regarding that subject both in America and Europe, and especially resulted in the act of April 22, 1794, making two degrees of murder, and the death penalty only for the first. It was this situation in January, 1794, which led President Washington to invite Judge Bradford to become Attorney-General of the United States. Although destined to but a little more than a year of work in the new field, Judge Bradford resigned from the Supreme Bench and the High Court of Errors the last day of the January term, 1794, and was appointed successor to Edmund Randolph on January 28, and the way was clear for Judge Thomas Smith, of Carlisle, to be called up higher and close his service as President Judge of the Fourth Judicial District of Pennsylvania.

## XI

### MEMBER OF THE SUPREME COURT AND HIGH COURT OF ERRORS AND APPEALS OF PENNSYLVANIA

1794-1809

#### I. THE CHIEF JUSTICESHIP OF MCKEAN, 1794-1799.

Three days after Hon. William Bradford, Jr., became Attorney-General of the United States, under President Washington at Philadelphia, Governor Mifflin, also at Philadelphia, on January 31, 1794, directed James Trimble, Deputy-Secretary of the Commonwealth, to write out on the conventional parchment a commission to the Hon. Thomas Smith, at Carlisle, making him a Justice of the Supreme Court. The deputy did it in the most gorgeous style of his quill, and tied to it, with a gay pink ribbon, the seals stamped on two paper stars, near which, on the upper left-hand side, the Governor signed in large letters: "Tho Mifflin." Mr. Trimble then countersigned it below and sent it over to the Enrollment Office, where, on February 3, it was recorded. It was then forwarded to Judge Smith at Carlisle.<sup>1</sup> Meanwhile, one of the most able lawyers of his court, James Riddle, Esq., was slated as his successor at the head of the Fourth District, and by the time Judge Smith had his affairs properly settled to suit the new order, which, at that time, was a term during good behavior or life, it was time to start for Philadelphia to attend the April term of the Supreme Court, set for the first Monday.

He did not at once move his family, now a large one, to the city on the Delaware, which was both state and national capital, as well as metropolis. This was partly

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<sup>1</sup> This commission, which is among the De Renne Papers, is given in photographic half-tone, much reduced. The original is about half the size of a page of an ordinary newspaper.



because there was not time. To twelve-year-old Eliza; Maria, of nearly ten summers; seven-year-old Williamina, and Juliana, aged four, there were now added two more little girls—Letitia Van Deren, born on April 22, 1792, and named after her mother, and four-months-old Rebecca, who joined the home on December 6, 1793. To take this little family of six daughters to experience a Philadelphia summer, where yellow fever was so liable to be a scourge, was not desirable, even if there was time.<sup>1</sup> So they were to remain in Carlisle until the autumn.

There is little reason to doubt that the Supreme Court was held in the old west room or Supreme Court room of the State House. Early in the preceding January the Judges had applied to the lower House of the Legislature for a law to erect a chamber contiguous to the State House for a Law Library,<sup>2</sup> and two years later, Stephen's Directory of the city, in speaking of the State House, said: "Besides the council chamber, the house of Assembly and several rooms, it contains the hall in which the Supreme Court is held. It is ornamented with two elegant clocks, placed on the east and west sides. On the East wing is the court house," meaning, of course, the county court house.<sup>3</sup> When Justice Smith came up from his Second street home that beautiful spring morning, how he must have been impressed with that group of buildings! Imagine him coming up into the square: there on the northeast corner, beyond the Philosophical Society's building, was the new City Hall, built in 1787, and containing the chamber of the National Supreme Court, where his friend, Judge Wilson, sat; there on the northwest corner, built two years after the other one, was where Congress sat—the capitol of the United States. On his way he may have passed Chief Justice Jay going to the one and Thomas Jefferson going to the other, while he himself sought the arched entrance of the old Supreme Court room in the State House itself—to be greeted for the first time by his fellow Justices. When they gathered in their

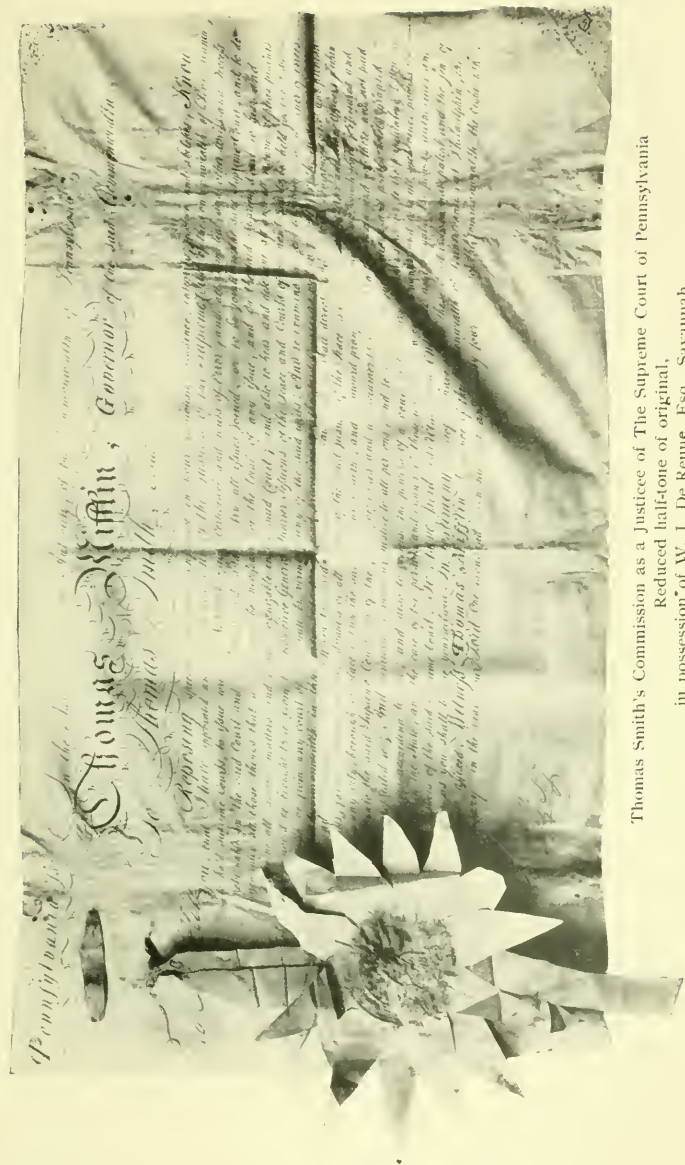
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<sup>1</sup> There had been a most disastrous siege of yellow fever the previous summer.

<sup>2</sup> *American Daily Advertiser*, January 3, 1794.

<sup>3</sup> Stephen's Philadelphia Directory, 1796, p. 68. Philadelphia Library, Juniper and Locust streets.





Thomas Smith's Commission as a Justice of The Supreme Court of Pennsylvania  
Reduced half-tone of original,  
in possession of W. J. De Reme, Esq., Savannah



red robes of office on April 7 there were two Doctors of Laws, namely, the tall and slender Chief Justice Thomas McKean and the stately Justice Edward Shippen, with Judge Smith's old friend, the florid and portly Justice Jasper Yeates. Justice Smith's "commission *quamdiu se bene gesserit*, \* \* \* was published in open court,"<sup>1</sup> and with this ceremony Justice Smith, who was said to be a man of somewhat below medium height and of swarthy complexion, ascended the bench of the Supreme Court and anew became a member of the High Court of Errors and Appeals. The latter, however, because of his preparation for removing at the time of its July session, he did not attend this year.

Justice Smith had long appeared before the bar of this court. The most careful search of the dockets shows no record of his admission, however, as it does reveal that of many others. For instance, Reed, Peters, Yeates, the two Biddles, the two Allens and Wilcocks were admitted in 1765;<sup>2</sup> Wilson and Magaw, in 1769;<sup>3</sup> Rush, in 1773;<sup>4</sup> Edward Tilghman, in 1774; William Lewis, in 1776; with wholesale readmissions in 1778: men like Sergeant, Shippen, James Smith, Wilson and others to the number of twenty-seven; but, so far, Thomas Smith's admission is not recorded. And yet he was a member of its bar in 1779,<sup>5</sup> for on October 2 he is plainly mentioned as making the motion which secured the admission of William Barton and James Biddle, an act, of course, based on his own membership of this bar. There are many cases credited to "Smith" for years before this, too, but here again is experienced the same difficulty as that afforded in the records at Carlisle. Many of these cases may have been, and probably were, the cases of James Smith of York and Carlisle. There was no uniformity in the methods of the successive Prothonotaries and their clerks, for in the same book James Smith will be marked "J. Smith" and "Smith," and Thomas Smith will appear as "T. Smith" and "Smith." The earliest record in which a distinction is discovered is

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<sup>1</sup> Yeates' Reports, Vol. I, p. 344. The docket also states that all the court were present.

<sup>2</sup> Docket 4.

<sup>3</sup> Docket 5.

<sup>4</sup> Docket 6.

<sup>5</sup> Docket 7, p. 583.

at the April term, 1783,<sup>1</sup> when, as at Carlisle, he appears as "Sm. Jr." At the September term, 1784, he is marked, in one case, "T. Sm.," and in April, 1785, "T. Smith," but from that on until 1791 the confusion is such that there can be no adequate conception of the amount of his practice in the Supreme Court, though it was plainly considerable, especially in the last five years of his practice.

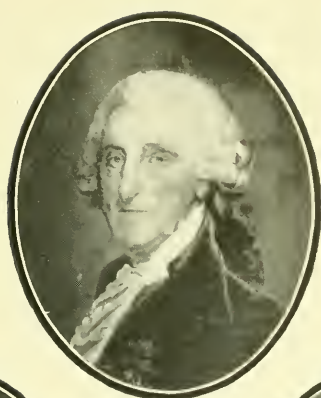
Among his rivals and colleagues before this bar had been such men as Wilson, James Smith, Wilcocks, Reed, Fisher, the Tilghmans, Lewis, Campbell, the Allens, Scull, Daniel Clymer, the Rosses, Hartley, Shippen, Yeates, Rush, Sergeant, the Bradfords, Coxe, the Biddles, Hamilton, Rawle, Magaw, Sample, the Levys, Moylan, Kittera, the Dallases, Brackenridge, Riddle, Montgomery, J. B. McKean, Duncan, Duponceau and a few others. This, of course, refers to the terms of the court *in banc* at Philadelphia. Some of these men were now in high judicial positions themselves. Wilson was on the Supreme bench of the United States and Bradford was national Attorney-General. Some, as Justices Shippen and Yeates, were on the bench beside him on that April morning in 1794. Others, as James Biddle and James Riddle, were on the District bench, and A. J. Dallas was Secretary of the Commonwealth, but most of his old colleagues and rivals came before him both at Philadelphia and on the circuit. This first April term was short, lasting only from the 7th to the 19th of April, inclusive.

He was on the bench in August, too, but this was probably a *Nisi Prius* court; while thus engaged the Whiskey Insurrection had reached such proportions in the West that, besides military measures, President Washington had directed the appointment of a Commission to confer with the insurgents and aid in preventing bloodshed. This Commission was composed of Attorney-General Bradford, James Ross, Esq., of Pittsburg, and Justice Jasper Yeates, the first mentioned to choose Justice Thomas Smith in case Yeates or Ross was prevented from serving.<sup>2</sup> They were not prevented, however, and their excellent work in quieting the minds of the insurrectionary element is a

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<sup>1</sup> Docket 13, p. 417.

<sup>2</sup> Pennsylvania Archives, Second Series, Vol. IV, p. 118.



THE SUPREME COURT OF PENNSYLVANIA IN 1794





matter of well-known history. The regular September term lasted from the first Monday until the 19th of that month, and after that the cool weather enabled him to settle with his family in Philadelphia, an achievement which was well accomplished during October.

The metropolis was estimated to contain 55,000 inhabitants at this time, and numbered houses ceased at Ninth street.<sup>1</sup> West of that were suburban and country seats. President Washington was at 190 High or Market street and Robert Morris at 192—these being the last two numbers on the south side of the street before Sixth street was reached. Governor Mifflin lived at 248 High street, and had the executive office on the second floor of the State House. Jared Ingersol, Attorney-General for the State, lived at 270 High or Market street, and Justice James Wilson of the National Supreme Court at 274. Alexander Hamilton was at the corner of Tenth and Chestnut and Edmund Randolph at 319 High street. Justice Smith seems to have been attracted to the southward at first, however. Attorney Miers Fisher lived at 92 South Front street and Dr. James Mease at 176, with President Barclay of the Bank of Pennsylvania at 216. The venerable lawyer, Nicholas Waln, lived at 146 South Second, and at 236, just beyond Lombard street, was a house formerly occupied by the Widow Stevenson, which Judge Smith considered favorably. Chief Justice McKean lived near Union street—the street in which Judge Bryan's home had been at one time—at 157 South Third street. William Lewis was in the same street and President of the High Court of Errors, Benjamin Chew, was at 110 South Third. President Willing of the Bank of the United States was at 106 and the elegant mansion and English gardens of Speaker William Bingham were at Third and Spruce streets. Attorney William Tilghman, Justice Edward Shippen and Dr. Benjamin Rush, Judge Smith's family physician, were in South Fourth street. So, in October, Justice Smith was settled in his new home in the Widow Stevenson house at 236 South Second street, where, according to the custom of the place and time, he also had his office.

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<sup>1</sup> Hardie's Philadelphia Directory, 1794.

"While you," said he to Justice Jasper Yeates, then engaged on the Whiskey Insurrection Commission, in a letter, on November 1, 1794,<sup>1</sup> "have, as I learn from the News-Papers, been investigating two untoward accidents, which I feared very much would have produced mischievous effects on the minds of the people, at the present crisis, I have been busily employed in beginning House-keeping a second time: I had no idea of the trouble, anxiety & loss, attending this business, till I made the experiment: I bought my former furniture during the war, at about 1½ Prices:—what I sold of it brought little more than half of what I gave for it:—I would have brought most of it down & saved money by so doing, had I known that there had been such a rapid rise in the prices of many articles here:—that rise is caused by the increased price of imported articles, & the absence of the greater number of the best Mechanics, in the Militia. \* \* \* Workmen must be fawned upon & flattered to do the best piece of work & when they have done it, they think they have done you a great favour, if they charge only double price—if you venture to hint that their charge is too high, they tell you they must soon charge higher, as money is now depreciating as fast as it did in the beginning of the war—nor is the observation ill-founded, for Mr. Shippen, Mr. Burd & a number of my acquaintances who attend to the matter, & do not speak at random, assure me that the expenses of living in the city, including House-Rent has increased *one third* within the last three years; so that I have *gained a loss*, or *advanced backwards* as an Irishman would say, by my last promotion: this consideration has had such an effect upon my judgment, that I very deliberately sat down before I began this letter (which I could not prevail upon myself to do before) & made out an account of the number of Days I attended the Supreme Court, &c., in April, August & September—taking it for granted that the Assembly intended what they ought to have expressed. To be serious on this point—to avoid the imputation of an affectation of singularity & disinterestedness, which might imply a reflection on those who received their expenses, I have made the charge—otherwise, I believe I should not

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<sup>1</sup> Stauffer Collection of Letters of Thomas Smith, Yonkers, N. Y.

have made it, although I am satisfied that it *ought* to be allowed & perhaps was so intended.<sup>1</sup>

"I believe Tacy told you," he continues, in a chatty, interesting way about the humor of the home details, "that I had provided so well at Markets & Stores for the reception of the Family, that she was astonished, as I had been altogether unused to that business: I had indeed provided as much Beef, Veal & Butter as would have lasted the family a week, if, unluckily, they had not been kept about a week too long before I bought them. I cannot brag much of my improvement in marketing since:—a few days after, in strolling along the new market, I saw some fish on a string, which I thought were small Rock. I bought them at what I supposed was a reasonable price & exultingly produced them to Tacy when she came down stairs: 'Rock my dear, why they are *Suckers*—ah, ha, ha!' Thanks to the cats, they soon put it out of her power, had any acquaintance come in, to prove what they were. Determined to make amends for my mistake, I went about ten days ago, to Market Street Wharf—the upper Ferry, determined to buy a large Rock. I saw but one, & that Oellers<sup>2</sup> seized giving the seller 11/3 after she had insisted on 15/—After going so far, I would not come home without Fish, & therefore contented myself with a few small Rock, which appeared very fresh—you may be sure I knew better than to buy suckers again.—As I brought them along I met Sharp Delany:<sup>3</sup> 'I am glad to see you at that business' [said he]. 'It is an awkward business to me as I don't understand anything about it.' 'You have, for all of that, got a string of as fine *Herrings* as I ever saw.' Taking it for granted this was a [joke] of Sharp's, I trudged along, & passed 2 women—one said to the other 'Those are the finest Herrings I ever saw.' Home I came, gave orders that they should be put where the suckers had been put before; but, to my mortification, the windows had been secured the day be-

<sup>1</sup> The salary of Associate Justice in 1793 was £600; in 1797, £750, or about \$3,750, if one uses modern rates of exchange.

<sup>2</sup> James Oellers, a hotel-keeper on Chestnut, between Sixth and Seventh streets.

<sup>3</sup> Sharp Delany was Collector of the Port, office at 40 Walnut street. It may be mentioned that General St. Clair was Governor of the Northwest Territory at this time.

fore, & my character as a market-man irretrievably lost. Tacy will no more trust me, but goes herself every market day to Market Street, which I do not approve of, although I am convinced that moderate exercise in good weather is conducive to her health. During the first two weeks, I think I walked \* \* \* 5 miles p. Diem & at least 3 since, & Tacy more than half as much—by walking 2 or 3 miles & going into 20 or 30 stores, she may perhaps save 3<sup>d</sup>, 6<sup>d</sup> or 7, which is a great matter you know, to a frugal House-wife, as she thereby discovers which are the cheapest stores.

“I am become a very Domestic Man—I have not spent an hour out of my own House, since I saw you & Ross at the waggon. I claim no merit for staying at home—against evening I am so tired generally by the business of the day, that had I any inclination, the distance is too great to go up town, & I have not one acquaintance in this part of it.” In consequence of this last fact, no doubt, Judge Smith even then looked forward to a residence in High street, where more of these “acquaintances,” by which, undoubtedly, he meant intimate friends like Justice Wilson, were located.

He soon became identified with some of the social and literary institutions. Societies for the aid of fellow-countrymen in need were quite common then. There were, about this time, the St. Andrew's Society, with Justice James Wilson as President and Dr. William Smith as First Vice-President; the German Incorporated Society, President Muhlenberg; the St. George Society, President Robert Morris; the Hibernian Society, President Thomas McKean, and the French Benevolent Society, with Peter S. Duponceau as Secretary. Judge Smith, according to the records of the Society,<sup>1</sup> had been made a non-resident member, presumably, in 1791, but on November 30, 1794,<sup>2</sup> he was made a resident member. He became First Vice-President some years later.<sup>3</sup> The Philadelphia and Loganian Libraries were located on Fifth street, nearly opposite the American Philosophical So-

<sup>1</sup> Catalog of the St. Andrew's Society, with an historical sketch.

<sup>2</sup> Certificate of resident membership among the De Renne Papers.

<sup>3</sup> Robinson's Philadelphia Directory gives him as First Vice-President in 1805.

ciety's building on Independence Square, the exact site being the south end of the present Drexel Building. This was the oldest circulating library in the land, and it was a privilege to be a shareholder. The price of a share was then £15, or about \$75 (if one uses modern rates of exchange), with an annual due of 15 shillings. Judge Smith bought share No. 769 on December 8, 1794,<sup>1</sup> and it remained as a part of his estate until it descended to his son in 1831. There is evidence that he was a devoted student and reader, and made much use of this rare collection during his remaining years in Philadelphia, when it could easily have been a habit for him, at the close of court in the State House, to step across Fifth street and take down a favorite volume of the day, after a long session or a difficult sitting in writing an opinion.

It is not known what kind of a law library the court may have had at that time. Certain it is, however, that there was but one volume of Pennsylvania decisions, the first volume by A. J. Dallas, not only then, but for some years thereafter. Most of the Judges kept manuscript notes of decisions and commonplace books which were fraternally consulted and highly valued.<sup>2</sup> Judges Yeates and Smith were especially careful to keep such notes, the former with such fullness that they were published, after his death, many years later. The library of the Law Association of the city was not begun until several years later, but it must not be thought that these Justices did not have excellent individual libraries. Judge Smith himself had a library which was valued at over £255,<sup>3</sup> and while, unfortunately, its character is not known, that of the library of Judge Yeates is, and no one who has examined its more than a thousand volumes but turns away from it with the conviction that, even though there was but one volume of Pennsylvania reports at that time, these Judges had libraries of remarkable excellence, containing the best legal lore of their time.<sup>4</sup> Such men were abundantly

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<sup>1</sup> Library Records, Book B, p. 65. The share passed out of the family with the death of Judge Smith's son.

<sup>2</sup> Eli Kirk Price, Esq., of Philadelphia, has the old commonplace books of Tench Francis and Edward Shippen.

<sup>3</sup> Inventory of his property, Recorder's office, Philadelphia.

<sup>4</sup> Judge Yeates' library has, through his daughter's wisdom, been



equipped to make the decisions which have been a source of constant reference from that day to this, and no one can read them without an increasing veneration for these first workers under our new Constitutions.

Fortunately, a volume of Judge Smith's own notes of cases in that April term, 1794, containing some expressions of interest, has been preserved.<sup>1</sup> "If there is a palpable mistake producing injustice pointed out," reads one of them, "Court will investigate an award. There must be good ground proved before Court will inquire into it. They will presume it right until the contrary be proved. The person taking his exception ought to prove his exception clearly."<sup>2</sup> "Minors, slaves in different State, reads another, "may be bound till 28 years, because they thereby gain their freedom."<sup>3</sup> "Note for the payment of — pounds, lawful money of Connecticut," says a third, "must be reduced according to the value of Connecticut, and not of Pennsylvania, where action was brought, both parties having Connecticut in contemplation."<sup>4</sup> Again: "Juror drinking at expense of Pltff. is not of itself sufficient reason for granting a new trial, on motion of def. unless it was done at the invitation of Pltff. or to gain favour, nor a juror giving his opinion after he was sworn."<sup>5</sup>

At the January term, 1795, a phase of the famous case of the sloop *Active* came before the court, bearing upon the action of the Judge of Admiralty, the then late Hon. George Ross. The court had hoped the matter would be taken before the Supreme Court of the United States, but as their judgment was insisted upon, they gave it. After enough Judges had expressed opinion to determine the verdict, Judge Smith added: "I had the honour of being one of the committee of the house of assembly, who met a committee of congress in conference on the business of

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preserved as a section of the Law Library at Lancaster. A catalog of it can be seen at the Law Association, Philadelphia.

<sup>1</sup> Chief Justice Tilghman, between whom and Judge Smith there was the warmest intimacy, thought so much of one volume of the latter's notes that he copied the whole of it, or, rather, copied a part and had Charles Willing Hare copy the rest for him. The Tilghman copy is in the possession of Eli Kirk Price, Esq., Philadelphia.

<sup>2</sup> Smith's Notes (manuscript bound volume), p. 1, No. 2.

<sup>3</sup> Ibid., No. 3.

<sup>4</sup> Ibid., p. 3, No. 6.

<sup>5</sup> Ibid., p. 4.



the sloop *Active*. Being fully sensible of the difficulty of eradicating early prejudices, I intended to have declined giving any opinion on the points argued before the court; but I will, however, now say, that I perfectly agree with the judge [Yeates] who last delivered his sentiments. Were it necessary to give my sentiments on the first point, I should incline to the opinion of the chief justice respecting it. On one point, I have no difficulty in saying that no action would lie against a judge, for what he does in that character."<sup>1</sup> He closed by giving several citations.

How he valued his notes and what difficulties the court sometimes found in arranging circuits is shown in a letter of July 23 of the following year, 1795, to Judge Yeates: "This morning I received your letter of the 23<sup>rd</sup>, in consequence of which I came immediately to Mr. Shippen's & showed it to him—while we were in deep consultation on the contents of it, & arranging & deranging the Circuit without being able to come to any conclusion satisfactory to ourselves, Mr. Burd entered, but even with his assistance, we found it impossible to accommodate you & all the gentlemen of the Bar. Mr. Burd finding he could give us no assistance, left us; we came at last to this conclusion—Easton 28<sup>th</sup> Sept., Berks 5 Oct., Northumberland 12<sup>th</sup>, Carlisle 19 & Dauphin 28<sup>th</sup>. The first will accommodate you—Dauphin beginning on Wednesday will give the Gentlemen who attend at Carlisle 2 days at the County Court during which they may do a good deal of the *necessary* part of the business. As for us, Mr. Shippen says we must eat, if we cannot catch, Fish. \* \* \* Having put into my pocket the Notes which you desire me to send to you, I inclose them with all their imperfections on their head: give me leave to say that in sending them, I pay you no bad compliment. I do not know many to whom I would pay the like, because there are not many on whose punctuality in returning them, I could rely—on you I can rely. \* \* \* I thank you and Charles for the Notes of the Trial in Fayette county."<sup>2</sup> It was usual to divide up

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<sup>1</sup> 1 Yeates, 463.

<sup>2</sup> Stauffer Collection, Yonkers, N. Y. This last refers to a case in his own name. In an earlier letter, referring to it, he says: "Do you intend to sleep again on the summit of the Allegheny Mountains as you go up, in order to breathe pure air?"

the State into circuits, usually two Justices to a circuit, although one often went alone.

This was written when the High Court of Errors and Appeals was in session, beginning as it did on July 13, with President Chew, Chief Justice McKean, Justices Shippen and Smith and President Judge Biddle of Philadelphia on the bench, presumably that of the old Supreme Court room. Among other lawyers who were at this time practicing in the High Court were Tod, Heatley, J. B. McKean, Charles Smith, Ross, Lewis, E. Tilghman, Ingersoll and Wilcocks. In a case reversing the judgment of the Supreme Court, Judge Smith sympathized with the decision of the High Court in the following words: "I do not feel myself at liberty to join in the decision of the general question, as I have acted in the character of an Executor, in a manner that may be affected by it. But I strongly incline to the opinion of the President, that a sale by an Executor, under a power to sell for the payment of debts, is valid; and the purchaser will hold the lands discharged from the general lien in favor of creditors. The present case, however, is not of that description; for, the Will only gives a power to sell for the payment of legacies; and such a sale must be void as to the creditors."<sup>1</sup>

On August 11 (1795) he took time to write a chatty letter to his cousin Dr. Peter Smith, at Aldie, the new home he had recently bought, referred to by Boswell in his "Life of Dr. Samuel Johnson." Dr. Smith was the means of communication with Judge Smith's mother and sister, both of whom the Judge had long since provided for in funds at interest and otherwise. "I wrote a long letter to you," he says, "about the last week in February or the first in March, 1794, but as I have not had the pleasure of a line from you since, & as Mr. Bond informed me lately, when I mentioned your silence, that one of the vessels with which he sent letters about that time had been taken and carried into France, I am afraid that you

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<sup>1</sup> 2 Dallas, 293. This is reported much more fully in 1 Yeates, 568, where Judge Smith gives the reason for giving any opinion at all: "But as the Judges who have spoken before me think it necessary that I should declare my opinion, I have no hesitation in saying that I join in the opinion delivered by the President."

never received that letter: I informed you in it, that from being President of the Courts of Common Pleas in the fourth Circuit, I had then lately been appointed one of the Judges of the Supreme Court of the State; in consequence of which I was obliged to reside at Philadelphia, the seat of Government. I removed hither accordingly." After expressing great anxiety about his mother and sister, he adds: "I expected some of Mr. Addison's friends before this time from Dovern in Banfshire, who might have seen you all; \* \* \*

"I informed you in the Letter which I suppose was taken," he continues, "that my Brother had lost his amiable wife in the malignant fever which raged here so dreadfully in the Autumn of 1793—since that time he lives forlorn & disconsolate, bereaved of that serenity which her society would have given to the evening of his days: last spring he had a severe attack of the Pleurisy, from which he has indeed recovered, but apparently impaired both in body & mind—he lives at his country-seat in a beautiful situation commanding a near view of the Schuylkill, 5 miles from the city, our Sister & he live there as if in an hermitage—I ride out occasionally to see him; but when a man has himself lost the enjoyment of life, another must relinquish them while in his presence—he has made an ample fortune—the children to whom it will devolve, would rejoice to see him enjoy his evening hours in the proper use of it; but, as I frequently tell him, he never will."

Referring to his cousin's son, a physician, and prospects for him in America, he adds: "The Medical Schools in this Place are now so complete that great numbers from all parts of the United States frequent them: indeed, the Profession is already overstocked (if I may use the expression), & our national prejudices are already almost equal to yours, in so much that unless a foreigner possesses first rate talents, he will have little chance of succeeding here now in any of the learned Professions, but more especially in that of Physic. It is an Idea eagerly propagated by the Profession of that art, & now pretty generally entertained by the People, that a Physician, a native of, & educated in the country, will thereby, if he possesses equal talents, understand the diseases incident

to the climate much better than one educated in a different climate: \* \* \* .”<sup>1</sup>

Of the relations between the two nations, he says: “Indeed I am not without painful apprehension that a stop may soon be put to the intercourse between the two countries—too eager grasping; & want of reciprocity, on the part of Britain in the late Treaty, have produced an intemperate flame among the people from one end of this country to the other; unless unimpassioned reason should direct the Councils of both nations, the consequences may be dreadful, & the enemies of both may have cause of triumph—they will no doubt be busy in both, in adding fuel to the flame. As I have never hitherto written a sentence on political subjects to you, you may suppose that I feel myself interested on the present occasion. I do indeed—the first political wish of my heart, is, that the United States may support their honour and dignity—the next is that they may never forget their obligations to France & that consistently with both, there may be a lasting & liberal reciprocation of good offices between us & the nation which gave me birth.”<sup>2</sup>

Among upward of eighty expressions, opinions and charges delivered from the bench which have been preserved and handed down in the recognized reports, the earliest definite opinion is a short one at the September term of that year, 1795, in which he gave the decision of the court. “At the court of *Nisi Prius*, held in Huntingdon county,” he says, “the following case was stated for our opinion. The plaintiff was jointly and severally bound, as surety, in a bond with, and for, the defendant. After the bond became due, the defendant was discharged, under

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<sup>1</sup> One can hardly forbear inserting a delightful little touch which appears at this point in the letter: “I have six children—all girls, and by the time you receive this, if my beloved wife is spared by heaven to continue my happiness, she will bring me a *seventh*. If I remember right, you were a *seventh son*, but as I do not recollect to have read or heard of any preëminence ascribed to a *seventh daughter*, I will be content with a son—but if the beloved mother be well it is perfectly indifferent to me. I need not tell you that my friends suppose this indifference is not a little affected.” The fact is, however, that the new arrival of November 11 (1795) was a boy, to whom was given the name of the Provost—William. The child only survived a few months, and died July 24 following.

<sup>2</sup> Letter to Dr. Peter Smith, of Aldie, in Cruden, dated August 11, 1795. De Renne Collection.

the general insolvent act of the State of Maryland, passed in April, 1787; and, subsequent to that discharge, the plaintiff was sued on the bond, paid the amount with interest and costs, and then instituted the present action (in which the declaration is for money paid for the use of the defendant) to obtain a reimbursement.—Under these circumstances, it is clear, that the action would be sustained in England, against a bankrupt, discharged by the bankrupt laws of that country. The insolvent law of Maryland does, indeed, exonerate the debtor from all debts due or owing from, or contracted by him, prior to his deed of assignment; but the English statute contains words equally comprehensive; and, yet, it has never been deemed to extend to cases like the present. The plaintiff could not have been entitled to a dividend of the insolvent debtors effects, and it would be a denial of justice to refuse him the only remedy, which he can have on this occasion. Judgment for the Plaintiff.”<sup>1</sup> At this same term another extended opinion was given on an argument for and against a new trial, of which the following is the closing paragraph: “Several cases have been cited by the plaintiff’s counsel,” said he, adding nearly a dozen more that he might have given to advantage, “to prove that where a verdict is *substantially right*, a new trial ought not to be granted. The law certainly is and ought to be so. But these cases do not apply to the motion before the court, because the verdict was entered with liberty to move for a new trial, and it was the understanding of both parties, that the point of law was to be argued before the court on this motion.”<sup>2</sup> A new trial was awarded, the several Justices each giving his opinion, as was frequently the custom at that period.

At the March term, 1796, he delivered one of his longest and most interesting recorded opinions, in which he points out a point of divergence between English and Pennsylvania law in the relation of children, as heirs to an estate. The expression in it of peculiar interest is the following: “I shall at all times pay a due regard to the laws, and the decisions of courts of justice of that country from which we derive our jurisprudence, where they are

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<sup>1</sup> 2 Dallas, 236.

<sup>2</sup> 1 Yeates, 545.



applicable to this country. The better we are acquainted with them, the more firmly shall we be convinced that they contain the utmost exertions of human wisdom on the subject matter; but at the same time, I must be permitted to own, that I do not feel my mind fettered by them in instances wherein they do not apply, but are repugnant to the spirit of our constitution. Instances indeed there may be, in which by our general practice (and in all cases where there have been solemn decisions), those laws have become the landmarks of property; and in such cases a judge is bound by them, although he would not in the first instance have adjudged them applicable to us. \* \* \* I find no case in the books similar to that before us. Where there are precedents, it is for the public good, that judges should adhere to them; but where there are none, it is equally incumbent on them to deduce one from general principles, which may reach the substantial justice of every similar case."<sup>1</sup>

In the early summer Judge Smith had a severe illness. In a letter to Judge Yeates, on July 6 (1796), he describes his experiences with his physician, Dr. Benjamin Rush. "In a few Days after the Date of my last Letter," he writes, "I was seized with a Fever & Catarrh, by which I was confined to my Bed for 10 Days; Dr. Rush, by Bleeding, Catharticks, & Sudorificks, reduced me pretty low, so that I believe I should have kept my Bed for some Days longer, had he not threatened me with the Lancet again; this made me get up. \* \* \* I met Dr. Rush yesterday morning. He immediately ordered me to lose more blood—seeing me begin to growl, [he exclaimed] 'Not a word—don't you know that I am Lord of the Lancet?' \* \* \* I have not obeyed him."

The High Court of Errors, beginning its sessions on July 11, sat much of the summer. The court opened with President Chew, Chief Justice McKean, Justices Shippen and Smith, and all President Judges—Biddle, William Henry, Rush, Riddle and Addison. On the 14th the Supreme Court members were absent, and so remained, for the most part, all summer, although Judge Smith was in attendance a couple of days before the death of his

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<sup>1</sup> 2 Yeates, 65.



son, on the 24th. In the autumn he was very busy on a *Nisi Prius* circuit, on which he delivered charges and opinions which are reported, and a record of one case appealed from the Cumberland court when he was Judge, in which he was sustained; but space will not allow the consideration of these, nor entries in his note-book for this year, which might be of interest.

Judges Smith and Yeates, as well as their families, were on terms of such intimacy that their correspondence often shows examples of humor and badinage, which add materially to the picture of their times. On January 29, 1797, Judge Smith writes: "Last Thursday evening I went into the Indian Queen to see an acquaintance; on entering the Door my ears were stunned by a stentorsphonick voice, exclaiming that he had been kept awake all the previous night in Lancaster by 3 Judges & others, Playing cards & drinking wine in the Room under that in which he lay—on approaching the Gentleman, I discovered him to be an old acquaintance & sometime afterwards I asked him, in a whisper, who the Judges were? He answered me in a whisper, but loud enough to be heard by every Person in the room (& it was pretty full): 'Judge Yeates, Judge Henry & an old gentleman whose name he did not know.' His fellow traveller said that you really kept them both awake all night. Mr. Coleman says the gentleman must have made three judges out of two, for he was not there. \* \* \* I assure you I was pleased at the information, \* \* \* several of our mutual friends told me that you confined yourself in your library as closely as a Hermit in a cell, insomuch that you exposed yourself to the danger of the influence of blue Devils, \* \* \* you seem to look on the bright side of things in term Time, & on the Circuit, & as much as any thinking man can, & therefore I laugh at our friends & go very near to swear that they are very much mistaken & I humbly think the information, of the two gentlemen above alluded to, proves that I am right."<sup>1</sup>

A letter to the same person, about a month later, shows how President Washington himself celebrated his now famous birthday. "It will give you pleasure to be informed

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<sup>1</sup> Stauffer Collection.

that the President seemed as happy on his birthday, as you could wish him—a dignified smile sat on his countenance, which I am told continued during the evening—the joy which he communicated to most of those who congratulated him on that Day, was damped by sighs from many of them, & from myself amongst others, at the thought that he is in a few Days to retire from that station which he has filled with so much dignity, for ‘take him all in all, we ne’er shall see his like again.’ His successor elect was sitting by him when we waited on him on Wednesday—you know his appearance is very respectable—so is that of the Moon in the absence of the Sun, but even toward the close of a bright Day, while the Sun remains above the horizon, her light is hardly beheld.”<sup>1</sup>

Governor Mifflin, who was a neighbor at this time, had long suffered from ill health, and as Judge Smith had received a letter from Yeates during July telling of a rheumatic trouble, the Judge describes a call on the Governor in which the matter is referred to. “He immediately brought out two treatises on *cold bathing*,” he writes Yeates, “which he has in hand all the day & under his pillow at night; \* \* \* he convinced me that cold-bathing is a Panacea; \* \* \* to reap the greatest benefit & to avoid the danger it is necessary to have these two treatises always in your Pocket & to peruse them with as much attention as *you* ever perused *Hoyle*. I regret that I cannot recollect the names of the authors, \* \* \* however, the fact is the Governor is apparently restored & in a better state of health than he has enjoyed for some years.”<sup>2</sup>

The year 1797 was an active one, as usual. As the junior member of the bench, always coming last for that reason, it is rather a testimony to his usual good judgment, than otherwise, that after McKean, Shippen and Yeates may have seen fit to express extended opinions, he should think enough had been said and deem it sufficient to concur, indicating which Judge’s reasonings

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<sup>1</sup> Letters to Judge Yeates, February 24, 1797, in the Stauffer Collection. These letters often contain many expressions, opinions and arguments of a purely legal interest.

<sup>2</sup> Stauffer Collection. Letter of July 25, 1797, to Judge Yeates.

would be his own.<sup>1</sup> Those he did give in these earlier years by no means suffer in comparison with the opinions of his seniors on the bench. His deference to them at this stage is well illustrated in the following letter to Judge Yeates, on July 15 (1797):<sup>2</sup> "Yesterday Mr. Shippen showed me the proposed arrangement as made out by him, & approved by the Chief Justice; Mr. Shippen also told me that the Chief Justice mentioned he & you would go to Bucks, Northampton, Luzerne, Northumberland & Dauphin; & that Mr. Shippen & I should go to Lancaster, York, Montgomery, Delaware & Chester. Mr. S—— asked me how I liked the distribution. I replied that I was, as I had been, & mean to be, quiescent entirely, unless some very particular reason should occur to compel me to pray to be indulged to go one Circuit rather than another, & that no slight reason would induce me to beg such indulgence—that upon the present occasion he could not suppose I could possibly have any objection.

"Mr. Shippen met me this morning, as he was going to show the arrangement, first proposed, to Mr. Ingersoll and asked me to go with him, where we substituted Montgomery for Chester & *vice-versa*, because Chester would otherwise have interfered with Northumberland & Mr. I—— wishes to attend both.

"Mr. Shippen then suggested to me that although you had left it to the Judges in the city in your absence to fix the Circuits & the distribution of the Judges to go on each, yet he submitted to me, as it was fixed that the Chief should go one Circuit & he another the propriety that I should mention the matter to you: I need not assure you

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<sup>1</sup> That he made full notes of each case is well known from the fact that he kept both full and abridged notes. (See Smith's Notes, MSS. copy by Tilghman on the inside of the cover, of which the latter has so stated.) That he also wrote full opinions, but, for the reason just indicated did not read them, is shown in 2 Yeates, 195, where he says: "I will not give my opinion fully, though I have prepared it at some length. The Chief Justice [McKean] has expressed my sentiments entirely, and I perfectly concur with him." Thus the very absence of his opinions, under the circumstances, is proof of his sound judgment, wisdom and lack of vanity.

<sup>2</sup> De Renne Collection. This letter was written, apparently, during the session of the High Court of Errors, which met July 10, with President Chew, Chief Justice McKean, Justices Shippen and Smith and President Judges John D. Coxe, John J. Henry, Addison, Biddle and Rush. This was the first attendance of Coxe and Henry.

that I do it with great pleasure; indeed I would write to you constantly on such [matters] if I supposed any change with you in the plan of the Chief Justice & Mr. Shippen would be more satisfactory to you, than the plan they adopt;—but I knew that Mr. Burd wrote to you sometime, & I took it for granted he always had, as the publication was never made when you have been absent at the arrangement, till about a week after:—add to this, that I had so explicitly declared my acquiescence, as to which of the Circuits I go, that my sentiments are not asked:—the last Circuit I took it for granted it was intended I should go over the Hills, yet I did not know you were to go with me till I saw the advertisement in the Papers—or rather, by reason of a hint from you the last night of the Supreme Court, I took it for granted the C. Justice \* \* \* would go. \* \* \* I \* \* \* assure you that if by exchanging Circuits with you, I can accommodate you, either now or on any future occasion, I will do it with as much pleasure, as I believe you would with me on a similar occasion, did the situation of my affairs render it necessary that I should go one Circuit rather than another. \* \* \* But I beg leave to put the matter upon another footing, by saying that you will really oblige me by previously intimating to me which Circuit you prefer in future when you and I are to go different Circuits.”<sup>1</sup>

The yellow fever, which was again epidemic this year, no doubt hastened Judge Smith's plans to seek a home on High street [Market]. This street, west of the market region—say from about Fifth street westward to the wooded square at its junction with Broad—was a favorite with national and state government officers during this decade. At this time, however, there were no numbers beyond Ninth street and but few residences. Judge Smith bought him a residence in the border-land between country and city, the next to the last property on the south side of the street before Tenth street is reached. Even four years after this the numbers did not extend to it. Ex-President Reed lived at 235 Market street, President Chew

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<sup>1</sup> In this letter also he speaks of the dangerous illness of his second baby boy, born on May 20 preceding, and named by his wife after himself—Thomas. The child died, however, on August 15 following.—Fly-leaf of family Bible in De Renne Papers.

of the High Court of Errors was at 258, William Rawle was at 260 and A. J. Dallas at 276, and six residences beyond this, all unnumbered, was Judge Smith's. There were, even then, no houses at all beyond Twelfth street westward. Five years after, or in 1802, his residence was numbered 256 High street, and two years still later, was 356. President Adams was at 190 High street after he entered office.

On September 3 (1797) Judge Smith wrote his cousin in Scotland: "I am sorry I must inform you that a malignant, contagious Fever, called the Yellow Fever, broke out again in this city 3 weeks ago, similar to that in 1793, which carried off near 5,000 citizens—& by which my Brother lost his wife: hitherto it has been confined to the vicinity of the River Delaware where it first broke out both times. The Physicians are divided in opinion, whether it was imported from the West Indies, or generated here—I join the former opinion; only about 100 have hitherto died of it. \* \* \* The Citizens are so much alarmed that, perhaps, one-third of them have left the city. I live in the very upper, western side of the city, a mile & a half from the place where the disease chiefly rages, & yet my goods have been packed these six days to move on the first information of its approach:—4 days ago 7 of the Doctors were confined by Fevers—some of the yellow fever—one of them was married on Saturday evening—seized Sunday—died on Tuesday: \* \* \* Since I wrote to you last I have bought an elegant new House in the best part of the city. I have paid already nearly three thousand guineas & it will cost me about 200 more to finish my back buildings.<sup>1</sup> Many of our new houses are built in a very elegant style—the room in which I now write is 26 feet 2 inches square. The place is more than my fortune enables me to give—that is, it is such a house as my family could not keep after my decease;<sup>2</sup> but the Education of my children was a principal inducement to my coming to reside in the City; now most of those in the upper ranks of life, who have large families, take a House in the Country in the Summer,

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<sup>1</sup> A total of something like \$16,000 by present exchange rates.

<sup>2</sup> His salary was quoted in the Directory of 1799 at £600.



but in my house I have the benefits of the City and Country combined—all the advantages of country air; \* \* \* the House being in the best part of the principal street in the city, it may be sold for its value at any hour. A few months at French & Music (the Forte-Piano) will finish the Education of my eldest daughter.<sup>1</sup> She has brought my memory to the test; it is 32 years since I learned French & although I have not devoted much of my time to it since, I find I am able to assist her lessons frequently. \* \* \* She writes in French to me when I am on the Circuit.

"I have since I wrote the last sentence," he adds in closing, "been witness to a scene of infantine distress, arising from jealousy—two of my younger daughters generally lead me up stairs to Breakfast or Dinner & if more than 2 come, the two youngest have the choice, unless any of them has committed a fault, in which case she is not permitted to have this honour. To-day when notice was given that Dinner was ready, the two youngest came down hand in hand as usual, but the third girl slipt down the back stairs & took me up that way, before the others got down; the little things cried with vexation and hardly ate any Dinner." He then adds that this last is put in for their grandmother to read—for whom all his letters show the greatest reverence and devotion.

The yellow fever epidemic seriously interfered with the regular September term of the Supreme Court more than once, and the present year, 1797, they met the first day of the term, but adjourned to the last day at once. The same thing occurred in 1798, and the High Court of Error in that year seems to have had a very short session, with only the Philadelphia members, Chew, McKean, Shippen, Smith and Coxe, in attendance. During this year, 1798, at the December term, he expressed a dissenting opinion, which so well illustrates his instinctive courtesy that the less technical part may be reproduced: "I am bound by the current of the book cases, and find myself compelled to give a different decision. It is my duty to express my

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<sup>1</sup> This daughter, Eliza, was long in correspondence with a daughter of Judge Yeates. The letters were collected and edited by the late Mrs. Alfred Whelen, with a view to publication. As society letters, they have much interest and value.



own sentiments, and the grounds on which they have been formed. \* \* \* I have considered the case before us, with all the attention of which I am capable. I have weighed the foregoing authorities in one scale, and the adverse cases in the other. In *principle* and *reason* the last preponderate; but the authority of the first is too great for me to get over. At the same time, I rejoice that the rest of the court feel themselves at liberty to decide upon principle and reason, unfettered by the determinations by which I feel myself bound, contrary to the wish and inclination of my mind. Were there no authorities, was it a question of *intention*, I would not, I could not hesitate to say, that the devise would be a bar of dower. \* \* \* Upon the whole, I find myself compelled to say, that judgment should be given for the demandant. But by the opinion of the other judges, judgment must be entered for the tennant."<sup>1</sup>

Another opinion, although written the following year, may be given as an illustration of the vigor and indignation that he could feel, although the amount of feeling in it may have been the cause of his not giving it. His nephew inserted it, however, when he edited Yeates' Reports, years later. Speaking of an apparently fraudulent course of an insolvent debtor, he said: "It behooves us therefore, as we regard the morals, honour and credit of the State, to give such a judgment as will secure to our fellow citizens, and all others having commerce with them, their just rights according to the laws of the land, and to guard them against subterfuges in violation of the law, on the subject matter before us, otherwise our decision will be cited for a precedent, and many evils by the same example will creep into the state. I have so great a veneration for the law, as to suppose nothing to be law which is not founded on common sense and common honesty. All laws rest upon the best and broadest basis, which go to inforce moral and social duties." Referring to the wealth of the man and its source in speculation, and a part of it suddenly and rapidly depreciating in value, he says: "In this embarrassed situation, a man \* \* \* all at once con-

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<sup>1</sup> 2 Yeates, 399. His references to English reports are here omitted from these opinions, as they are at the hand of any lawyer and not of service to the lay reader.

veys to his children all his estate, which was of a certain intrinsic value, for these notes, forsooth! 'Angels and ministers of grace defend us!' He must be willfully blind, indeed, who cannot see the farce acted in this transaction. His counsel certainly had great command of their countenances, to refrain from laughter, in stating it! I could as soon believe in *transubstantiation*, as believe that he did not make these conveyances from an *apprehension* that the immense sum \* \* \* might be in danger, which determined him to secure to *himself* all his estate of certain value; I say to *himself*, for in such family transactions, a secret trust must be presumed. The *character* of *Lear's daughters* are not *nature*; but yet no father, in full possession of his reason, will put his estate in the power of his children, and render himself dependent on them, without sinister motives. \* \* \* It is contended, that this fraud is confined to *concealing* part of his estate; consequently, he may willfully and deliberately convey the whole, or the greater part of it in such manner, as to put it beyond the reach of his creditors, with even an avowed intention to defraud them, and may accomplish his intention completely, and yet he shall not be continued in prison for an hour, although he has *defrauded* them thereby of millions; whereas if he *conceals* the smallest part with the same view, he is liable to imprisonment under the law. Common sense and common honesty combine in forbidding such a construction; it would disgrace the *morality* of the *Jesuits*, and even St. Omer's would blush at it."<sup>1</sup>

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<sup>1</sup> 2 Yeates, 505. In a letter to Yeates on the case, he says: "Mr. Levy said this afternoon that the investigation could not be agreeable to *at least one of the Court*. The C. J. took fire—but afterward heard him 2½ hours with great Patience." Dated June 18, 1799. Stauffer Collection.

## XII

### MEMBER OF THE SUPREME COURT AND HIGH COURT OF ERRORS AND APPEALS OF PENNSYLVANIA

1794-1809

#### II. THE CHIEF JUSTICESHIP OF SHIPPEN, 1799-1805.

The year 1799 was an eventful one. First, a wave of democracy was passing over the land, and with it came the great victory in Pennsylvania, in which the Republicans, or Democrats, as they often called themselves, in contradistinction to the Federalists, placed their old-time Chief Justice, Thomas McKean, in the Governor's chair. At the time he was inducted into office, on November 17, 1799, he was but a few months over sixty-five years of age, yet he had been Chief Justice for over twenty-two years. He was so remarkable a man that he is said to have paved the way, as a political leader, for the accession of Jefferson to the Presidency of the United States. Party feeling ran high throughout Pennsylvania, and especially in the central and western parts, which demanded that the capital should be brought nearer the center of the State. Harrisburg was decided upon as the permanent seat, but the government, it was determined, should leave Philadelphia at once, as the national government was about to do, and Lancaster was settled upon as the temporary seat beginning in the following November. Governor McKean, with his usual dispatch, on the next day after assuming office, the 18th of December, provided for the vacancies made by his removal from the Supreme Bench. There could be but one voice as to who should be Chief Justice. No man was more fit for it than the venerable Edward Shippen, now seventy years of age; a man who had studied under Tench Francis and in the Temple; one who was evidently in training for it as Prothonotary under Chief Justice Allen; who had been President of the Common Pleas of Phila-

delphia until his accession to the Supreme Bench, and had now seen not only eight years of service on that bench, but nearly double that period in the High Court of Errors and Appeals. This was an entirely proper promotion, too, which moved the whole court up one point in seniority of service.<sup>1</sup> These Judges were now all Federalists, as were all the other Judges of the State, and here was an opportunity for Governor McKean to place a member of the victorious party on the bench. Another element, too, had to be considered: Chief Justice Shippen represented Philadelphia; Justice Yeates, Lancaster, and Justice Smith, the mountain region. The western part of the State claimed the fourth Justice. Judge Alexander Addison of Pittsburg was distinguished enough for learning and ability to at once occur to the mind of every one as the natural candidate, were it not that he had been, and was still, not only an ardent Federalist, but was using his charges to grand juries to instruct the public in the principles of strong government, as he believed to be his duty.<sup>2</sup> The feelings aroused in 1794 in that region were not sufficiently allayed to endure much of this—possibly, too, Judge Addison retained too much of the spirit of the Presbyterian pulpit, which he once filled, for a judicial office; although Judge Rush was quite as much of a grand jury preacher, as any one who has read his charges must admit. <sup>3</sup>The result was that Governor McKean selected a brilliant Pittsburg lawyer, writer and Democrat, Hugh Henry Brackenridge, who was one of the acknowledged literary and political powers of the day, but whose course during the Whiskey Insurrection had laid him open to suspicion as a leader in it, although it is said that Washington, Hamilton, Mifflin and Ross understood and were in sympathy with what he was doing, namely, not thwarting the insurgents in order to influence them.

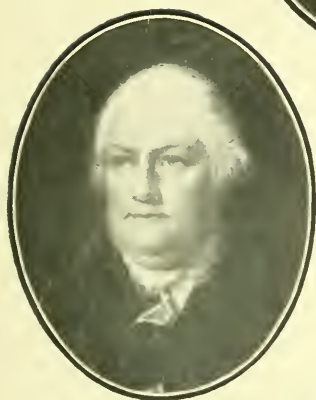
Brackenridge was a genius and a great wit, although Philadelphia considered him rather coarse. He delighted

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<sup>1</sup> Justices Yeates and Smith were each fifty-four years of age at this time.

<sup>2</sup> Addison's charges were published.

<sup>3</sup> A volume of Rush's charges was published by Dr. Ashbel Green and other Presbyterian ministers of Philadelphia. They were moral rather than political, and especially upheld the so-called "blue laws" of 1794.



THE SUPREME COURT OF PENNSYLVANIA IN 1799





to make fun at the expense of that city, and especially of the American Philosophical Society, which had its headquarters there. He was fifty-one years of age at this time, was a Princeton man, a friend of Freneau, and, like Addison, formerly a Presbyterian minister. He studied law under Chase, afterward of the National Supreme Court, and, with Ross, became a leader of the Western bar. For the past three years the whole West and much of the East had been reading and laughing over his "Modern Chivalry"—the first novel written west of the Alleghenies; he was, indeed, a man of national reputation, but rather over-much of a free lance for the East. He was at loggerheads with Yeates, because of the latter's course as a commissioner to the insurgents in 1794, and, although he and Judge Smith appear to have been friends—at least until some uncertain date after the accession of Brackenridge to the Supreme Bench—an incident occurred at a dinner party, which, according to the late Judge W. M. Hall of Bedford, put an end to whatever friendship may have existed.<sup>1</sup>

At a certain court presided over by Judge Smith, Brackenridge was attorney for the plaintiff in an ejectment suit. As the trial proceeded, Judge Smith's rulings seemed unfavorable to the plaintiff, who happened to be an ignorant man. Brackenridge, who, delighting in a "practical joke," and seeing the anxiety of his client, whispered that if he would hand over a few "Half Joes"—a coin then current—he would see the Judge at the recess. The man handed them over, much to his surprise, no doubt. He took pains to see the Judge, of course, never for an instant thinking of making such a suggestion, the very idea of corrupting him being a vital part of the "joke." After recess, however, Brackenridge, who was far more sure of his case than his client, noting the movement of the case in their favor, and the corresponding elation of his client, whispered: "The Half Joes are working!" The

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<sup>1</sup> J. Montgomery Forster, Esq., of Harrisburg, informs the writer that at a casual meeting with Judge Hall in the State Library some years ago the latter told him this story, which, as both gentlemen have produced careful historical work, and it has had their confidence, seems to have a foundation in fact. The story is told elsewhere in a different way. Brown in his *Forum* makes the client take the initiative, and Brackenridge merely follow him.

charge to the jury being wholly in their favor, the client, in suppressed excitement, whispered to Brackenridge: "Them Half Joes done their work!" As Brackenridge finished telling this story to the members of the dinner party, Judge Smith rose from the table with unmistakable indignation, and, turning to Brackenridge, "Sir!" said he, "you have done me an injury for which nothing can ever atone. That man went down to his grave in the belief that I was an unjust Judge. As long as you live, never speak to me again." And, it is said, he ignored Brackenridge ever after, but whether the incident occurred early or late in their membership of the Supreme Bench, or whether it occurred at all, it is a thoroughly characteristic story of both, and an excellent comment on the purity of a Judge so well known that it was a joke to find a man so ignorant as to be unaware of it.

Brackenridge, as a leader of Western Republicans, now that he was on the Supreme Bench, sought to have Judge Addison brought before that court because of an incident which happened in connection with one of those offensive charges to the grand jury, namely, ordering a colleague to be silent when attempting a reply—an incident which had serious consequences to the Supreme Court for many years thereafter, and consequently to Judge Smith. The incident was, in fact, only a part of the widespread Republican revolt, which had as one of its especial grievances the independence of the judiciary by its Constitutional term during good behavior or for life. As soon as Governor McKean took his seat the Republicans felt that the time had come to begin "Judge-breaking," as McMaster calls it,<sup>1</sup> and in March, 1800, appealed to the Governor to take action on the charges against Judge Addison. It was not done, however, and when the incident referred to happened in December of that year, Judge Brackenridge made his attempt to get the matter before the Supreme Court. This, also, was refused, but when a recurrence took place, evidently well planned for, Brackenridge secured the impeachment of Addison before the Senate of Pennsylvania in January, 1803, and the latter was deposed.

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<sup>1</sup> History of the People of the United States, by John Bach McMaster, Vol. III, p. 155.

While this long contest was going on in one end of the State, there was, at the other end, in the metropolis, a contention between Thomas Passmore and Messrs. Pettit and Bayard over an insurance policy. The matter reached the Supreme Court on August 6, 1802, and on September 4 Bayard filed exceptions to the judgment because of irregularity. Four days later, while the matter was still in the hands of the court, Passmore posted a libel on his opponents in a public coffee house. For this the Supreme Court brought Passmore before them. After sentence had been passed for contempt, Passmore attempted to make some remarks to the court, saying that Bayard had been the aggressor. Judge Smith said this was adding insult to injury, and Judge Yeates remarked that sentence had passed and they could hear no more. He was forthwith imprisoned on December 28. Then followed the successful impeachment of Addison in January, 1803, and forthwith, on February 26, Passmore appealed to the House of Representatives to impeach three of the Judges of the Supreme Court—Chief Justice Shippen and Justices Yeates and Smith. On the 15th of March the matter was recommended to the next House, which took it up in March, 1804, at Lancaster.<sup>1</sup> On the 24th they received a letter from Judge Brackenridge, which, after stating in detail the unavoidable causes of his absence from the bench in certain stages of the case, said: "The presumption may have been that I did not take a part, and doubtless I might reasonably have excused myself, but I cannot say that I did not take a part: I gave the case all the consideration that I could, at the time, and three fourths of the Court who had heard all, declaring themselves fully satisfied I saw no reason to warrant a dissent, but concurred. I cannot therefore distinguish my

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<sup>1</sup> There were other modes of attack on the judiciary, as the following letter from Charles Smith to Judge Yeates indicates. It shows, too, that the reorganization of 1806 was under way a long time. "The representatives," said he on March 6, 1804, "have this day passed the 10th District (or Judiciary) bill, as it is called, with only 18 dissenting voices. It was warmly opposed by Boileau & others, on constitutional grounds, to wit, the virtual removal of the present Presidents, as the bill stands—but it had no effect on the large majority—tho' it is said it is likely to meet a successful check on that principle in the Senate, from the circumstances of the day.—and in all probability it will fall to the ground."—Whelen Papers.

case in law from that of the other Judges, and in honor I would not. I am far from coveting, or courting a prosecution, but am unwilling to incur the imputation of screening myself when in strictness equally liable. But I think it absolutely necessary for the credit of the republican administration, that I should not be distinguished. As there can be no stronger evidence than a man's own acknowledgment, the house will find no difficulty in a resolution to add my name to the list of the impeached officers."<sup>1</sup> The committee took this letter to the Governor, assuming that he would remove Brackenridge for insolence. Governor McKean refused; they pointed out that "*may remove*" in the Constitution meant "*must remove*," whereupon the Thunderer reminded them that it sometimes meant "*won't remove*." The House refused to include his name with the rest of the court. They applied for legal aid in the trial, according to the words of Boileau, to Rawle, Levy, both the Tilghmans, and the younger McKean, who avowed that the Judges were right, and refused to serve.<sup>2</sup> Apparently thinking that all the bar were of

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<sup>1</sup> From a copy of Judge Brackenridge's letter of March 22, 1804, among Judge Yeates' copies of the impeachment papers, endorsed by Judge Yeates himself. It is strange that accounts of this highly honorable letter should always have attached to it an air of bravado, and carried the impression that Brackenridge *would* have concurred, not that he *did* actually concur at the time with the court. These Yeates papers are in the possession of Dr. Alfred Whelen, of Philadelphia.

<sup>2</sup> William Rawle, on the fly-leaf of his copy of the proceedings at the trial, by Hamilton, now owned by the Law Association of Philadelphia, as "Law Trials, 2," says: "I was appealed to on the part of the House of Representatives to take a part in this trial, but, looking on the impeachment as wholly unfounded, I declined. E. Tilghman was also appealed to." McMaster in his History of the People of the United States, Vol. III, p. 159, says that neither Dallas, Ingersoll nor Duponceau, "nor any lawyer of note in Pennsylvania would serve them," but Mr. Dallas himself said, after explaining that none but those who expressed belief that the Judges were right declined, and "there were many others at the bar, who were not thus circumstanced, and whose talents and legal knowledge would eminently qualify them to assist the managers on this occasion. But they were not appealed to." Proceedings by Hamilton (Law Trials 2), p. 124. Among the Yeates papers, above referred to, there is also Edward Tilghman's own copy of his memorandum made at the time the prosecution invited him to assist them, on December 15, 1804. It says: "My answer instantly was: that I was clearly of Opinion the Power in Question was constitutional, that the exercise was essential to the Advancement of Justice, that I had been present at all the Proceedings before the Court in Pass-

the same opinion, the managers went to Delaware and got Cæsar Rodney. Jared Ingersoll and A. J. Dallas took the case for the Judges, whose fair character, said Dallas, "to this moment is unimpeached." The Senate sat at Lancaster as a court on the morning of January 7, 1805, with Speaker Robert Whitehill, the vigorous defender of the Constitution of 1776, as President of the court. Before them sat the venerable Chief Justice, now seventy-six years of age; Justice Yeates and Justice Smith, each sixty years old—all Federalists. Dallas and Ingersoll made able and eloquent appeals that stir the blood of a reader of them a century later. The trial lasted nearly three weeks and closed on the 25th, with a vote of 13 for impeachment and 11 against, Speaker Whitehill voting with the majority; but as there was not the two-thirds vote required by the Constitution, the Speaker announced to the Chief Justice and Justices Yeates and Smith that they were acquitted.<sup>1</sup> Very soon after, the aged Chief Justice resigned.

The people were nearly as excited over the whole affair as they had been in the old days of the contest over the Constitution of 1776. The Gubernatorial campaign of the year 1805, which resulted in the reëlection of McKean, was as fierce a fight as that over the adoption of the Constitution of the United States. The clamor for revision of the Constitution of 1790 that arose was aimed at the judiciary tenure, and finally resulted in the reorganization of the judiciary under the act of February 24, 1806. This provided, among other things, that the State should be divided into an Eastern and a Western district, where the whole court should sit; greater opportunity for *Nisi*

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more's Case & that the sentence pronounced upon him was a very mild one, & therefore could not consistently, with my Judgment, Honor or Conscience be concerned against the Judges. Edwd. Tilghman."

<sup>1</sup>Report of the Trial and Acquittal of Edward Shippen, Esq., Chief Justice, and Jasper Yeates and Thomas Smith, Esqs., Assistant Justices of the Supreme Court of Pennsylvania, on an Impeachment before the Senate of the Commonwealth, January, 1805, by William Hamilton. In a letter dated February 10, following the trial, containing the only known expression regarding it by Judge Smith, it refers to some new efforts of the malcontents: "I am not surprised at anything which may now be brought forward—at any misrepresentations of our official conduct, by the dissatisfied or discontented party, & there must be always one in every suit decided."

\* \* \* Letter to Judge Yeates, in the Stauffer Collection.



*Prius* courts; that circuit courts should be held in each county with only one Supreme Judge on the bench; that the High Court of Errors and Appeals should have two years to close up its business and then be abolished, and that the Common Pleas districts should be increased to ten.<sup>1</sup> Of course, this relieved the situation, and, so far as Judge Smith's lifetime was concerned, the contest was practically ended, although, in fact, it ended only with the elective judiciary of 1851.

But what of Judge Smith's work on the bench during this long period of over five years? Numerous expressions of opinion are found for these years in the reports of Dallas, Yeates and Binney, but space allows only a few significant extracts. At the September term of 1803 he found occasion in a certain case to change his mind. He said he always thought it more honorable to retract an erroneous opinion, when the error was discovered, than to persist in it, upon the suggestion of a false and pernicious pride.<sup>2</sup> In another cause, the same year, he charges the jury that a certain result ought to be arrived at "in justice to the commercial character of our country."<sup>3</sup> In one of his longest opinions he says: "I believe no such diversity of opinion *now* exists among judges, or lawyers. For the intention of the testator is now looked upon as the polar star. \* \* \* If such be the settled rule of law, if such construction has become a rule of property, however absurd I may deem the distinction, although I may be convinced that it defeats the intention in the disposal of their real estate of 99 out of 100 testators, who make their wills without the assistance of able counsel; yet I certainly shall not be the first to shake it, or any other settled rule of property. If this or any other rule of property has crept in, or shall creep in, through inadvertency or otherwise, \* \* \* contrary to reason, \* \* \* the legislature can, and no doubt will, on proper representations, make such alterations as may be necessary. \* \* \* We must declare the law, when clear, without regarding consequences. \* \* \* If in England, the law relating to construction

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<sup>1</sup> Bioren's edition of Laws of Pennsylvania of 1805-'07, p. 9.

<sup>2</sup> 4 Dallas, 263.

<sup>3</sup> Ibid., 272.



of wills, as well as in other instances, be daily melting into common sense, more and more disentangled from the feudal fetters, which too long continued to enchain the understanding; if form gives way to substance, and justice be no longer entangled in a net of law, it would ill become us, to let a feudal drag-chain defeat the intention of a testator. \* \* \* That intention, however, cannot be carried into effect, if it be contrary to every clear and settled rule of law \* \* \* ."<sup>1</sup> In a case in 1802 he said: "I am conscious that I listen to the arguments of counsel in every case with attention. I will not say that in this case I listened with more than usual attention. I certainly did not employ less, especially as we and the parties have been deprived of the abilities of our elder and more experienced brothers. Judges cannot even in their judicial capacities entirely divest themselves of the feelings of men. The humane mind generally sympathizes with bail, who are obliged to pay for the default of the principal \* \* \* ."<sup>2</sup>

In one of his longest and ablest opinions, namely, in *Mitchell v. Smith*, 1804, he expresses his conviction in the following strong terms: "If there ever was a case, in which political arguments ought to have great weight, if ever, were the case even doubtful, arguments from utility and public policy ought to turn the scale, if upon principles of law, conveniency and sound policy, the original plaintiff ought not to prevail, this is that cause, perhaps more emphatically so than any other cause which ever came before any court in this state. \* \* \* I might rest here on this point: but because next to the duty of administering justice between the litigant parties, is that of convincing the losing party, that the whole case has been examined and considered by the court, I will" etc.<sup>3</sup>

<sup>1</sup> 3 Yeates, 235, 1801.

<sup>2</sup> Ibid., 347, 1802. Probably attention should have been drawn to the case mentioned in 2 Smith's Laws, 190, and also in *Huston on Land Titles in Pennsylvania*, 427, a case before Judges Smith and Brackenridge at Lewistown in 1800, in which Judge Smith gave the charge to the jury. "This," says Huston, "is called a leading case, and always cited and recognized, when any of the four points come in question."

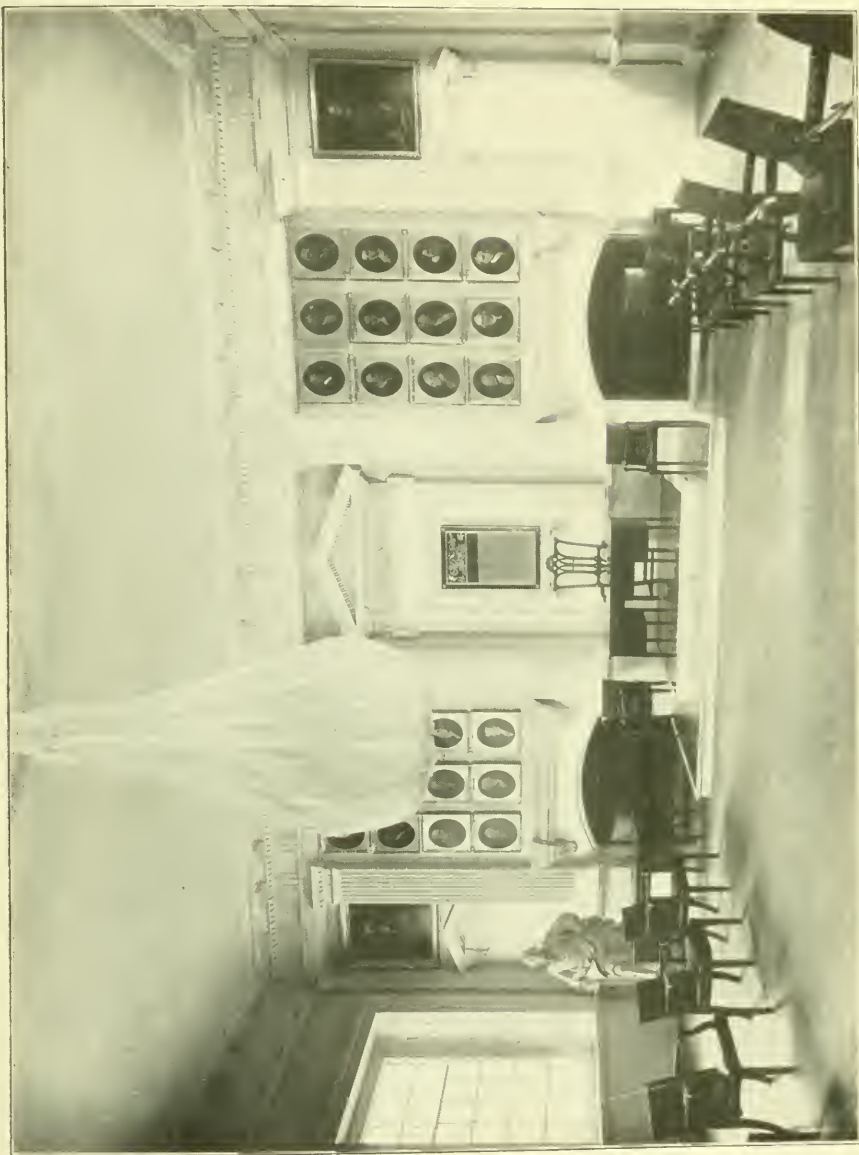
<sup>3</sup> 4 Yeates, 89. Judge Charles Smith, who edited these reports, inserts this as an "able argument," not contained in Mr. Binney's report of the case, 1 Binney, 110.

In a dissenting opinion bearing on forfeiture for treason is an interesting paragraph: "In every nation, under every government, there are many men of gloomy discontented minds, of vehement spirits, of disappointed or perverted ambition, of desperate fortunes. The minds of such men are restless, ever on the rack to gratify their malignity or their ambition, or to repair their shattered fortunes. So far as they consider themselves they are desperate; the peace, welfare, or happiness, or even the existence of government which protects them can have no influence in restraining such men from the most desperate measures to accomplish their purposes. The only human consideration which can withhold them from endangering the nation, is their attachment to their wives and children, which is frequently implanted, for wise purposes, unusually strong in the minds of such men by the all wise Author of our being. From this point of view the law of forfeiture is merciful to mankind; it may sometimes be productive of partial ill, but its general effect will be universal good."<sup>1</sup>

During the period from 1799 to 1805, inclusive, Judge Smith sat at every term of the High Court of Errors and Appeals except in 1799. There were sessions in which he was present but part of the time, as in 1800 and 1804, but there were few Judges who gave so constant service. At the session beginning January 2, 1805, he was the senior member of the Supreme Court present, and, consequently, presided over the deliberations of the High Court, in the absence of the venerable President, Benjamin Chew, who had presided until the year before, at the advanced age of eighty-two years. There was an attempt to have Judge Chew preside in July, 1805, when the city members heard he was to be in town. They had met at the court house and there was no quorum, so they adjourned to the house of Chief Justice Shippen, in Fourth street; Judges Shippen, Smith and Rush went from there to President Chew's town house, but still there was no quorum. So far as known,

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<sup>1</sup> I Binney, 18. In a letter of February 23, 1799, to Judge Yeates about this case and hinting at these views, he says: "I believe the matter is differently considered here, but should we even ultimately all think alike, the question is of that nature, that it is incumbent on us to give the reasons of our judgment with the utmost legal precision, which will be still more necessary if we should differ." Stauffer Collection.



THE SUPREME COURT ROOM OF ABOUT 1892, INDEPENDENCE HALL  
(The Declaration Room)  
Half-tone of Photograph by Rau



however, that is the last time this remarkable man met with the Judges, although he lived to the great age of eighty-eight years, and even survived Judge Smith himself. It seems to be almost a tribute to President Chew that when age incapacitated him, the highest of the tribunals, of which he was the head for considerably over a decade, should be abolished, as it was the following year, although allowed two years in which to close up its business. The meeting above mentioned, at President Chew's residence, was also notable in another respect, in that it was the last meeting of the High Court that the other venerable Judge, Chief Justice Shippen, ever attended.

With these two notable changes in the two high tribunals, Judge Smith became, next to Judge Yeates, the senior member of both courts, and a period of his life is thereby marked. It will be well to let him speak for himself of this period. On March 4, 1799, he wrote Yeates: "I made up my opinion on the question of Curtesy after I wrote to you last—in considering it attentively, new Ideas presented themselves to me, which were not touched on in the arguments. If I am right the cause was not well argued. I beg leave to detail my present Ideas on the subject, to you as fully and at large, as you detailed yours to me, making no doubt but you will give my sentiments as much consideration, as you have enabled me to give to yours."<sup>1</sup> In a later letter to Yeates he speaks of the lameness of the horse he rode upon the circuit: "My punishment is just—my judgment directed me to part with him last fall & to buy another, during the winter; but my regard for an old & faithful & decent steward prevented me from obeying the direction of my judgment."<sup>2</sup> With all his courtesy, Judge Smith was blunt, as the following to Yeates will show: "If you think I do not take pleasure in performing any business which you commit to my care—why the D—I do you trouble me with it. I hate apologies when none are necessary, & not being necessary, they are improper."<sup>3</sup> He occasionally gives some very interesting glimpses of Yeates, who was a most

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<sup>1</sup> Stauffer Collection. This, no doubt, refers to the case in 1 Binney, 18.

<sup>2</sup> Ibid. Letter of April 15, 1799.

<sup>3</sup> Ibid. August, 1799.

methodical man and insisted on careful receipts when he sent the Philadelphia Judges their salaries from the State Treasurer at Lancaster; Judge Smith says he assured the Chief Justice "that according to your *Plan* (which word he says you have substituted for the word *System*, which has been so long & so frequently hackn'ed by you that he supposes you have worn it threadbare—in which Mr. Lea laughingly joined him) he ought to send you a receipt for the checks by the first Post. 'What!' said he, '& as he will send me a check for my circuit allowance, I must send him a receipt for that also & so have the Postage of two letters to pay—that won't do: you call me an economist—I will give you an instance worth your imitation: to avoid double postage I wrote my last letter under my account for allowances for circuit expenses & scarcely left myself room.' 'By Jupiter,' said I, (you, a classical swearer, would say by Jove) 'I did the very same thing in my last letter & after having done so, I discovered I had written on the place where the wafer ought to be,'" but by the "greatest good luck in the world" he found space for it elsewhere.<sup>1</sup> In another letter to him, Judge Smith states his own custom regarding recommendations for office: "It is my uniform rule never to *recommend* any Person for office; this I repeatedly told the late Governor, & the reason on which it is founded, in a Commonwealth."<sup>2</sup> On the 25th of August, he tells Judge Yeates, at whose home his daughter is visiting, something of the birth of another son, saying: "If you do inform her [the daughter], tell her that her Mama has given her Brother a *great name*—every Patriotic American will guess. I need not say George Washington."<sup>3</sup>

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<sup>1</sup> Stauffer Collection. July 4, 1800.

<sup>2</sup> Ibid. August 2, 1800.

<sup>3</sup> Ibid. This son, the third, the other two having died in infancy, was born August 4, 1800, and was their last child. (Another daughter, Frances Sophia, had been born September 15, 1798.) He grew to manhood under the guardianship of Chief Justice Tilghman, graduated at Princeton in 1818, and after studying law under Horace Binney, was admitted to the bar in 1823. His scholarly tastes led him to travel and exploration in Europe and Asia. As a member of the vestry of Christ Church for thirty years, his benevolence and financial ability led him to give \$5,000 to its hospital every year. He was a member of the American Philosophical Society from 1840 until his death, and was a founder, councillor and vice-president of the Pennsylvania Historical Society. In 1824 he published "Facts



Many letters of this period exist, which would be of technical interest to lawyers, but cannot be considered here. Among the letters to Scotland, however, appear the following interesting glimpses of his personal and family life. After speaking of his three eldest daughters, he says: "The 3 next are now at the schools. I removed from Carlisle to this expensive place, for the purpose of having my daughters educated;—the Country not yet being furnished with Schools for female Education; they learn Reading & Writing accurately, Arithmetic, Geography, Dancing—and such as have an ear for it, Music. My 3 eldest play on the *Forte Piano*, \* \* \* I have since I wrote the last line, performed a Hymn on the same instrument myself this Easter morning, as is my custom every Sunday morning, as soon as I rise. Having occasionally amused myself during 30 years with the Violin, I immediately learned the notes of the *Forte Piano*; but before I bought one for my daughters, my fingers had become too stiff (my right hand being lame as I formerly mentioned to you), for me to perform with ease. My two eldest daughters learned French also for awhile, so that my eldest could write to me in that language, but that nation & language falling into disrepute here, the school was broken up, and they have, I suppose, forgotten what they did learn. Their valuable mother, as remarkable for her industry, as for œconomy, brings them up to both—\* \* \*; my eldest or 3<sup>rd</sup> could keep house & manage the affairs of the family, should the greatest of all misfortunes happen to me and to them. By the example of such a Mother, Religion is made amiable to her Daughters—five of whom walked before us to Church on Friday (Williamina E. remaining at home to superintend the family affairs). Mrs. S—— took Juliana to our worthy Bishop yesterday to be confirmed & they are all preparing to join in the Rites of the day—I must remain at home to

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and Arguments in Favor of Adopting Railroads in Preference to Canals;" in 1829, "Defense of the Pennsylvania System in Favor of Solitary Confinement of Prisoners," and other like essays, and in 1832 edited "Wood on Railroads." He never married, and his nephew, G. W. J. De Renne, Esq., to whom he was much attached, was the closest friend of his later years. He died on April 22, 1876, in his seventy-sixth year. His home was at 9 Clinton street, Philadelphia.

finish this Letter. My beloved wife was, by the effects of the War, deprived of almost the whole of the fortune which she expected to bring me; but she has proved a fortune herself, & has essentially assisted me in acquiring a competency, very far beyond my expectations or merits. I will be explicit on this head in hopes to prevail on my Mother to accept the small present which I offered her, without any hesitation because of my large family, if she has the least occasion for it. By the blessing of God upon my unwearied industry, I am worth about twelve thousand guineas. (My salary is only 2000 Dollars a year at  $4/6$  Sterling each—the expenses of my family including the Interest of the [debt?] on my house, nearly 4000 Dollars which I supply by the Interest on my money)—With upwards of two thousand Guineas of it, I bought an elegant new House near the upper end of High street, being the most pleasant situation in Philadelphia, where I enjoy the advantages of both the Town & of the Country—a thick wood grew where I now sit many years after I came into this Country.”<sup>1</sup>

He began to feel the weight of age and exposure about this time. “I begin to feel the weight of years: my aged Parent must feel it much worse: the general weakness which you mention, is a forerunner of her removal from this state of being; may her few Days be serene & her dissolution easy, most fervently prays to God her dutiful son, who must not hope that heaven will permit him to arrive at the good old age which his Mother has attained.” In this letter, too, he says: “Writing is easy to me, as the habit of writing on the Bench enables me to take down the substance of every speech at the Bar; being obliged to write so fast is the reason that scarcely any Judge or Lawyer writes a good hand. In addition to this I have, as I mentioned to you before, a wound in my right hand

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<sup>1</sup> Letter to his cousin, Dr. Peter Smith, Aldie, in Cruden, dated April 18, 1802, in the De Renne Collection. He gives some most interesting items about his brother, Dr. William Smith, to whose declining years he had long given most careful attention, so that, could the enfeebled old Provost have foreseen it, he would also have referred to his jurist brother, for whom the doctor had the tenderest affection, as “my benefactor.” Their obligations were thoroughly mutual, long before the end of the Provost’s life came, on May 14, 1803. He was the latter’s legal adviser and named as one of his executors.

by a fall from my Horse.”<sup>1</sup> In another letter to his cousin and referring to Scottish Judges, he says: “Your Judges can have no idea of the severe duty which we perform. I am going a Circuit of between 6 & 700 miles, over the Allegheny Mountains, next week.” This is the letter in which he says: “Looking on Mr. Boswell as a heavy writer, I did not, till lately, read his ‘Tour to the Hebrides with Dr. Samuel Johnson.’ I have not the Book by me at present, having had it from the Philadelphia Library, of which company I am a member; according to my recollection he says that when they were at Slaines Castle Mr. Boyd (William, I suppose, or Charles) told them the Earl had educated a son of one of his tenants for, & employed him as, a Surgeon on his estate—that the Surgeon so educated had acquired property sufficient to enable him to reimburse the Earl conveniently; which he offered & the Earl declined with equal honor to both. Had I not believed that you received your education during the lifetime of the Countess of Errol, Aunt of the late Earl, I should suppose you were the person meant—how is it?”<sup>2</sup> In this letter, too, he again speaks of failing health: “My health I feel gradually declining, although I am very well just now; the duty of a Surveyor is very severe, & undermined my constitution 25 years ago. My Professional duties at the Bar [were] uncommonly laborious, having for 9 years rode upwards of 3,000 miles  $\bar{p}$  annum, over the most mountainous parts of the State, \* \* \* Since I was appointed a Judge, our duty has been very hard indeed, owing to the rapid increase in the population of the State. We had only 13 counties a few years before I came on the Bench; we have now no less than 30 & yet the number of Judges is the same. I have twice been on the point of resigning, on account of my health. It was not

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<sup>1</sup> Letter to his cousin, Dr. Peter Smith, of Aldie, in Cruden, dated June 12, 1802, De Renne Collection. It is unfortunate that these notes on speeches of lawyers are lost, or, at least, not yet found.

<sup>2</sup> Dr. Peter Smith, on March 25, 1805, writes: “Mr. Boswell has been wrongly informed as to the late Lord Erroll being at the expense of my education; he was right so far: when I left the Edin. College in the year 1762, I borrowed either 5 or 10 pounds sterling to assist me to pay the fees of the college as it was due, which sum when I was in cash, I offered to his L<sup>d</sup>ship again, but he would not take the money.” De Renne Collection.

till 3 Days ago that I believed I would be able to go the long western circuit this autumn. I have for 18 years been afflicted with a cough which I caught by being obliged to sit up all night (1<sup>st</sup> January) in a frontier Court House, trying a cause; at times & especially of late it has been very violent, approaching frequently to an *Angina Pectoris*. After my own long Circuit into 8 distant Counties this Spring was finished, I felt myself obliged to go part of the Circuit of the Chief Justice & of Judge Yeates, by reason of their sudden indisposition. I had to hold Court in one county by myself; the weather was excessively hot, which affected my head very much. \* \* \* I certainly received a degree of the *coup de Soliel*.”<sup>1</sup> On January 3, 1805, he says: “Our Court ended this day—from the last week in August inclusive—a period of four months, one week and 3 Days, I have been sitting in court or on the Road between the Courts (650 miles riding) every Day excepting 3 Days. Your Judges in Britain would deem this intolerably hard official duty.”<sup>2</sup> In most of his letters from this time on there is generally evidence of his illness, much of which he attributed to the sunstroke above-mentioned. On August 23 (1805) Chief Justice Shippen writes to Judge Yeates: “I find our Brother Smith very much averse to the labour of charging the jury; in order to avoid it he has adjourned one cause till the next morning that I might be present to give the charge. \* \* \* Mr. Smith has offered as an expedient that he would travel my usual circuit.”<sup>3</sup>

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<sup>1</sup> Letter to Dr. Peter Smith, September 16, 1804. De Renne Collection.

<sup>2</sup> De Renne Collection. In this letter he speaks of the publication of the last volume of his brother's works, and mentions the engraving of his brother as the best “of any I ever saw done in America. It is from a Picture, equally striking, Painted by Mr. Stuart, the most celebrated Portrait Painter in the United States, when my brother was 75 years old.” This latter portrait is now owned by Dr. John H. Brinton, of Philadelphia, and the former may be seen in the first volume of the first edition of Dr. Smith's works.

<sup>3</sup> Shippen letters, in Dr. Alfred Whelen's collection.

### XIII

#### MEMBER OF THE SUPREME COURT AND HIGH COURT OF ERRORS AND APPEALS OF PENNSYLVANIA

1794-1809

#### III. THE CHIEF JUSTICESHIP OF TILGHMAN, 1806-1809.

The turbulent political year 1805 witnessed still other changes than have been already mentioned in connection with the last meeting of Judge Chew with the High Court of Errors in July. This meeting of the two venerable heads of the highest tribunals in Pennsylvania—for Chief Justice Shippen was now seventy-six—must have impressed the Chief Justice very much. Very soon after, in the autumn, he sought to resign, but, says Edward Burd on November 18 in a letter to Judge Yeates, “as the Governor was under some difficulties in ye Appointment of a Chief Justice, I understand that Mr. Shippen has consented to continue to serve some time longer.”<sup>1</sup> At the close of the December term, however, the aged Chief Justice resigned, and on the last day of 1805 the resignation was accepted. On January 13 (1806) Mr. Burd again wrote Yeates: “My opinion is that the World has been much deceived with respect to ye Governor’s Intention of filling ye Office of Chief Justice. He is so close-mouthed that ye Reports depend only upon Supposition. General St. Clair who is just arrived from Lancaster, says ye current Report there is that James Ross is to be ye Man;—which I do not give credit to.” Some one, he adds, asked Mr. Shippen who was to be Chief Justice and he replied that “some people supposed that Mr. Wm. Tilghman, others that Mr. McKean’s Son would be appointed, but he *knew nothing about it*.”<sup>2</sup> Governor McKean had already shown

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<sup>1</sup> The Burd Papers, edited by Lewis Burd Walker, p. 211.

<sup>2</sup> Ibid., p. 212.



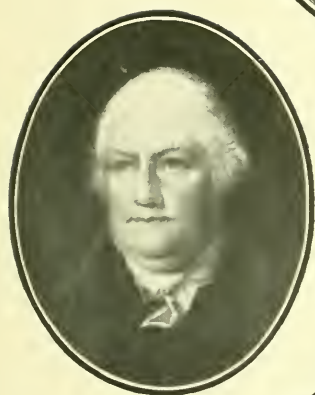
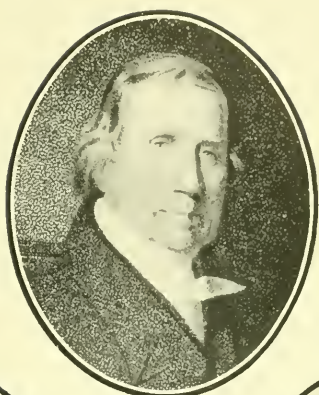
his resistance to the wild and reckless reaction of the Democratic Republicans, and it was safe to predict that, even though in the Supreme Court, as it now stood, Yeates represented the Lancaster region, Smith the mountain region and Brackenridge the west, and the remaining member ought, for territorial reasons, to come from Philadelphia; Governor McKean well knew that the time had not yet arrived when the Chief Justice could be chosen outside of Philadelphia. Otherwise, Justice Yeates might naturally have been promoted, as Shippen had been. In consequence, the Governor offered the position to "a leader of the old bar of Philadelphia," who declined to aid the prosecution in the late impeachment, namely, Edward Tilghman, who, says Binney, had "the most accurate legal judgment of any man of his day, at the Bar of which he was a member."<sup>1</sup> Mr. Tilghman, however, like Horace Binney himself at another time, declined the offer and recommended his scarcely less distinguished kinsman, Judge William Tilghman.

Judge Tilghman, now fifty years of age, had spent much of his life in Maryland, and only settled in Philadelphia permanently but a year before Judge Smith did. He was, however, a son of the Secretary of the Proprietary Land Office of Pennsylvania, James Tilghman, who was a lawyer; he was a grandson of that legal pioneer, Tench Francis, a student under Provost Smith, and began the study of law under Benjamin Chew about the time Judge Smith began practice in 1772. Late on the night of March 3, 1801, President Adams had made him Chief Judge of the Circuit Court of the United States for his home circuit—one of the so-called "mid-night Judges"—a court that the Jeffersonian Republicans abolished a year later. About the time that his venerable preceptor, Chew, was holding his last meeting with the High Court, Judge Tilghman was appointed President Judge of Common Pleas of Philadelphia—a position from which the late Chief Justice had entered the Supreme Court and a very natural place to look for a Chief Justice. Governor McKean nominated him. Forthwith the Democratic Republicans of Philadel-

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<sup>1</sup> The Leaders of the Old Bar of Philadelphia, by Horace Binney; extra illustrated edition, p. 51, at the Law Association, Philadelphia.





THE SUPREME COURT OF PENNSYLVANIA IN 1806



phia entered a protest, whereupon the Governor turned to the committee: "Indeed! Inform your constituents that I bow with submission to the will of the great Democracy of Philadelphia; but by —, William Tilghman *shall* be Chief Justice of Pennsylvania!"<sup>1</sup> And Tilghman was commissioned on February 25 (1806) and took his seat on the bench on March 3, the first day of the spring term—the youngest member of the court by eight years.<sup>2</sup> "His person," says David Paul Brown, "was slightly formed; he was about five feet eight inches high, with mild gray eyes, fine teeth, handsome features, and of the most gentle and amiable expression of countenance. \* \* \* His voice was very sweet though not strong, and his deportment upon the bench was marked by that attention which springs only from a conscientious desire of a faithful performance of duty."<sup>3</sup> It was not long before it became evident that the solution of the problem that made Tilghman, Yeates, Smith and Brackenridge the members of the Supreme Court in 1806 was the best that could have been made.

The earliest reported opinion of Judge Smith, under the reorganized court, was at the December term of that year, on a case never before decided in Pennsylvania. "The question now to be decided by this court," said he, "is of great importance. I understand that it has long been discussed among the most eminent counsel in Pennsylvania, and opinions have been given by some of them; but that it never has received a judicial decision. I believe, on inquiry, that it never came before any Court in Pennsylvania until the 24<sup>th</sup> of May, 1804, when it came before the Circuit Court, holden for the County of Northumberland, by Judge Brackenridge and myself. \* \* \* We said that 'it is an important question, and it is proper that it should receive a solemn decision in bank; we therefore propose, that the measure of damages should be left to the jury, on each of these grounds, which is done accordingly.' \* \* \* After my return I was induced to make diligent inquiry, whether the point had ever been decided, and what had been the general opinion of eminent

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<sup>1</sup> *The Forum*, by David Paul Brown, Vol. I, p. 344.

<sup>2</sup> *4 Yeates*, 278.

<sup>3</sup> *The Forum*, Vol. I, p. 393.

counsel on it, and the result was that expressed by the Chief Justice. Upon a very attentive perusal of the cases on the subject; the notes of which, taken by me then, and annexed to that case, are now before me; they did not in my opinion warrant me in drawing a different conclusion; but I saw difficulties, whether the question was decided one way or the other, which made me anxious to hear it deliberately argued: ready to alter my opinion, if I should discover, that it was not well founded; or if the opposite should be supported by law, be more conducive to the general interest, and be more agreeable generally to the intentions of the parties to such contracts. I have heard it very well argued. If the very well arranged and able argument of the ingenious young gentleman who began (Mr. Sergeant) has not been able to shake the opinion which I had formed, I am induced to believe that it is well founded on solid principles of law. I must, therefore, adhere to it upon the present occasion;" and the court supported his former opinion.<sup>1</sup>

Early in 1807 he expressed a rather full opinion, in which the following occurs: "Whether the great strictness in favour of life, which has at all times been required in England, in every point of indictments in capital cases, ought to extend to indictments for offences formerly capital in Pennsylvania, but now subject only to imprisonment at hard labour, and a certain proportion of the time to confinement in the solitary cells, will deserve great consideration when the point comes directly before the court. For the humane Judge Hale complains, and the complaint has been a thousand times repeated since his time, 'that this strictness has grown to be a blemish.' \* \* \* So far as these unseemly niceties have prevailed in capital cases decided before the revolution, we are fettered by them. We are not at liberty to overrule an exception which has prevailed before in a case exactly in point, although every judge and every well read lawyer who hears it, may be convinced it has no foundation in the merits of the particular case, or in the general principles of law. However, great as this evil undoubtedly is, it is perhaps better that it should be submitted to, than that

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<sup>1</sup> 4 Dallas, 412.

the opposite evil should creep into its place. \* \* \* This consideration will make us 'rather bear those ills we have, than fly to others that we know not of.'"<sup>1</sup>

During the same year he most happily and modestly expresses the only dissenting voice in the court. Referring to the opinion expressed by the Chief Justice and concurred in by the other Justices, he says: "But as I cannot concur in the opinion which he has delivered, it is incumbent on me to state the reasons of my dissent. I know that my brothers do not suppose me capable of differing from them, by an affectation of singularity, or with a view to court popularity, or to avoid the reverse on popular questions. When I am compelled to differ from the majority of the court, it becomes me not to be arrogantly confident in my own judgment; but such as it is, I must be guided by it. I am the less diffident of it, because it very generally leads me to concur with my brothers. \* \* \* Upon the whole, after the short consideration which the various business in the court has enabled me to devote to this case, I am much afraid, that should we sanction this verdict and principle,

" 'Twill be recorded for a precedent;  
And many an evil by the same example  
Will rush into the State.'"<sup>2</sup>

Early in the year, Judge Smith showed signs of still greater decline in health. On the 29th of January, 1807, he writes his cousin in Scotland: "I caught a bilious remitting fever on the Circuit, the last week in September: it is a disease frequent in this Country in Autumn. I never had it but once & that was so long ago as 1773, & then but slightly in comparison to this fit. \* \* \* I then sent for Dr. Rush. \* \* \* I was obliged to be absent the first two weeks of the December term & scarcely able to attend the 3<sup>rd</sup> week. I had not before been absent from Court 6 hours during upwards of 15 years when I was first appointed to the bench. I was so enfeebled by the disease that I am recovering but gradually. I had lost my appetite & colour: both & my strength are restored so much that I was able to Dine yesterday with the

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<sup>1</sup> I Binney, 206.

<sup>2</sup> 4 Yeates, 476.

Marquis de Casa Yrujo, who has been many years the Spanish Minister here; but Mrs. Smith would not let me walk either thither or back. I therefore at her request used our Coachee, as I did from necessity during the week that I attended court. \* \* \* If, as I hope, I shall be again restored to as much health as can be expected in my 62<sup>nd</sup> year, after a very fatiguing life during 38 years of it, I cannot be sufficiently grateful to the merciful & beneficent Creator & Preserver of my Being. My Circuit last autumn was 762 miles—most of it on our new settled frontier, roads & accommodations bad of course. \* \* \* Perhaps, my Dear Cousin, this will be my last letter to you. Even if it should not—if I should be permitted to write you again, yet, according to the usual course of nature, in the course of *very, very few* years you & I must be changed from this state of being—must give an account of the deeds done in the body. \* \* \* I have long [been] impressed with the belief that I should not live to a greater age [than 65 years]—judging by my present feelings, I do not expect to live so long: in my present apprehensions, it is a consolation to me that although I cannot leave a fortune to my family, I will probably leave them a moderate competency: I never have wished more:—I believe I have no reason to wish it were a farthing less than it is.”<sup>1</sup>

Four days after this letter, he and Mr. Tilghman held a criminal court for two weeks in Philadelphia. During the second week—the coldest day of the session—the court house was so crowded that the windows had to be opened, and a draught caused an attack of pneumonia. He was then confined to his bed for three weeks and so reduced, he says, that at the end of six weeks, even, he could hardly get on his horse. On March 10 (1807) Judge Yeates writes his wife: “Judge Smith rides out daily, but looks miserably. I think he will be scarcely able to attend Court this term.” Ten days later, however, he wrote her again: “Judge Smith was in Court this forenoon, but his looks

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<sup>1</sup> Letter to Dr. Peter Smith, of Aldie, in De Renne Collection. In this letter he speaks of his children just going to the “first Dancing city Assembly of the season” and his usual habit of going with them. He also refers to a legacy he provided for his mother “32 years ago”—1774, in his will of that date.



are very much against him. He seems pale and weak & his voice is scarcely audible. His constitution is evidently much shattered, and I think him in some considerable danger. Yet, I still flatter myself that the warm weather will restore his health."<sup>1</sup> He attended but a few days at this term, and his feeble condition led Chief Justice Tilghman to offer to go out on a distant circuit for him. He himself went out on a nearer circuit and was in so bad a condition that "the Lawyers on behalf of themselves & their clients—the jurors also—joined in intreating me not to sit in court more at the great risque of my life; but I persevered."<sup>2</sup> He was ill a short time, but seemed again to improve some.

About this time, April 7, 1807, to be exact, the Legislature, still Democratic Republican, with Simon Snyder as Speaker of the House, passed an act requiring the Justices of the Supreme Court to report "which of the English Statutes are in force in this Commonwealth, and which should be incorporated into the Statute law of the State." This was a work to which Judge Smith would be better able to give attention than that of the courts. The work took the better part of two years and was possibly the most important work on which Judge Smith was engaged during the rest of his life. It was not completed until the 8th of December, 1808. "This important document," said Horace Binney, in his third volume of decisions, "is here inserted at the request of the Judges of the Supreme Court. In many respects it deserves to be placed by the side of judicial decisions, being the result of very great research and deliberation by the Judges, and of their united opinion. It may perhaps not be considered as authoritative as judicial precedent; but it approaches so nearly to it, that a safer guide in practice, or a more respectable, not to say decisive, authority in argument, cannot be wanted by the profession."<sup>3</sup> Judges Tilghman, Yeates, Smith and Brackenridge say in their report that it was "executed during the short intervals of official occupation."<sup>4</sup>

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<sup>1</sup> Whelen Collection.

<sup>2</sup> Letter of January 11, 1808, to Dr. Peter Smith, in De Renne Collection.

<sup>3</sup> Binney, 595.

<sup>4</sup> *Ibid.*, 598. In a letter to Judge Yeates, dated July 8, 1807, and enclosing an official copy of this act, Judge Smith writes of it:

During the summer of 1807 he was at Bedford Springs a part of the time, to have the benefit of the mineral waters there, and prepare him for his autumn circuit in the western part of the State. He had some severe exposure and finally an attack of the influenza, which prevailed so greatly that not one in a thousand, he says, escaped it. He adds that it was the second time it was epidemic since his arrival in America. The disease seemed not to leave him, and caused a violent and persistent cough and catarrh, which added greatly to his other difficulties. He recovered, however, and was performing his duties in 1808.

In an able charge to a jury while on the circuit during this year, his conscientious sense of accuracy led him to administer a rebuke to certain members of the bar. "It is to be regretted," said he, "that gentlemen of the bar will not take accurate notes of trials, and yet will cite the cases as authority. I have before heard of the case in Northumberland, and have no hesitation in saying there must have been some circumstances which are not stated, or it is not law." This charge was sustained by the Supreme Court about three years later, "for," said Chief Justice Tilghman, "the opinion delivered by Judge Smith to the jury appears to have been in matters of law correct."<sup>1</sup> His absolute frankness, too, was illustrated in an opinion during this year, in which he sees no relief for the loser; "but," said he, "I think the case is peculiarly hard on the defendant."<sup>2</sup> His expressions became more and more short and concise during this year. His last reported opinion is a dissenting one at the December term of 1808. He says that had the point reserved been in the usual form, he should have agreed with the rest of the court. "But the words 'under the circumstances of the case' have some meaning, and were inserted for some purpose. If it was not intended thereby to empower the court

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"This is impossible, during the time that we can devote to the business. I am much afraid that I will scarcely be recovered from the fatigues of Court, in time to proceed to the Court at Pittsburgh. This business will require much deliberation, consultation, & time to perform it with reputation to ourselves & to the benefit of the Community. I dare not engage my mind on it in my present weak state."

<sup>1</sup> 4 Binney, 163.

<sup>2</sup> 4 Yeates, 556.

to investigate and decide on the merits, they were worse than nugatory; they tended to perplex. I am glad therefore that, if I have discovered during the course of the argument that injustice has been done, I am at liberty to give my voice for a new trial, although it has not been moved for within the four days. More than one of the court during the argument said that a motion ought to have been made; but I rejoiced that the strong inclination of my mind, the justice of the case, was not fettered by form."<sup>1</sup>

During this year, also, the High Court of Errors closed its existence, the last session being held the morning of the 2d of July (1808).<sup>2</sup> Judge Smith, however, had his last service in it at the meeting on December 29, 1806, when there was no quorum, although, of course, he was a member of the court until its close. This also was the last meeting of it which Judge Rush attended—the man who had a longer period on this high tribunal than any other, namely, almost a quarter of a century. Ex-Chief Justice Shippen, who had died the spring before this last meeting attended by Judge Smith, came next in length of service, about twenty-two years, while only McKean's two decades on its bench exceeded the long service of about fifteen years which Justice Smith himself gave to it. Of others, only President Chew approached him in a period of almost similar length, and it may be recalled that, omitting McKean, these were the very members who constituted that last meeting with President Chew in July, 1805. In less than a year after this last-mentioned meeting Mr. Shippen died, and on that evening Judge Smith wrote Judge Yeates: "On last Saturday I dined in a company at the Chief Justice's [Tilghman]—but 3 Days ago his venerable Predecessor sat there next to me, ate a hearty dinner & was as cheerful as usual & we came away early together—to-day he had nearly finished a full Dinner, & now, in the manner he has expressed his wish to me, & I find to others, he sleeps with his Fathers, at a good old age, having possessed his faculties to the last, & died without a groan, respected by all who knew him & most

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<sup>1</sup> 1 Binney, 457.

<sup>2</sup> Docket of High Court, in the office of the Prothonotary of Supreme Court at Philadelphia.

esteemed by those who knew him best. \* \* \* If you outlive me you will probably learn from my will, that I believe I will die suddenly in Spring or Autumn. May we after having performed our duties in this state of being as well as our late Brother has done, enjoy our faculties to the end of it, & leave it with the love of our families & connections & with the esteem of the worthy part of our species to whom we are known."<sup>1</sup>

The end came for Judge Smith, also, in the way he desired. Even on the 22d of September, 1808, Judge Yeates, writing his wife from Washington, Pennsylvania, says: "Judge Smith was not so well as I could have wished when we parted. His health is in a very ticklish situation, and I dread the effects of the bad weather on him, when he crosses the Allegheny river."<sup>2</sup> At the December term, following, the one at which his last recorded opinion was delivered, the spring circuits for 1809 were arranged, and Judge Smith was assigned to the Delaware District. He was to hold a *Nisi Prius* court at Philadelphia for four weeks, beginning February 20, at the end of which, on March 20, the general Supreme Court for the Eastern District was to begin. The day before the general term, namely, March 19, Judge Yeates wrote from Philadelphia of him, saying: "I am told he is much better."<sup>3</sup> Court began on the 20th, with Judge Smith present, but he was so feeble that he was urged not to attend. He did attend, however, but on the morning of Wednesday, March 29, "Judge Smith left his seat on the bench in consequence of indisposition."<sup>4</sup> For a few weeks past he had been annoyed by a dizziness, which he attributed to having taken so much tincture of iron and other remedies, one of which seemed to stop a gentle perspiration to which he had become subject. Dr. Rush attended him. When he returned Wednesday he dined as usual, but soon, complaining of a pain in his head, took to his bed, and was in such violent nausea that Dr. Rush lulled the pain with

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Letter of Judge Smith, dated April 15, 1806, among the Whelen Papers.

<sup>2</sup> Whelen Papers.

<sup>3</sup> Ibid.

<sup>4</sup> Supreme Court Minutes Book, March 29, A. M.

laudanum. He was more quiet Thursday, but early on Good Friday morning, while Mrs. Smith was attending him, "his spirit left its body,"—to quote her own sad message to his aged mother in Scotland, "but," she further wrote, "we will not sorrow as those who have no hope."<sup>1</sup>

When it became evident that Judge Smith was so ill late Thursday the court adjourned until Saturday at 10 o'clock, and at that time adjourned until the following Tuesday. Chief Justice Tilghman, between whom and Judge Smith there had grown up the warmest friendship, had been chosen by the latter, together with his old student and nephew, Charles Smith, Esq., and the ex-Prothonotary of the Supreme Court, Edward Burd, Esq., to join with Mrs. Smith as executors of the estate and guardians of his one son and seven daughters. The funeral services were held on Sunday, April 2, at Christ Church, where Judge Smith had been a member since his residence in the city, and occupied the "President's Pew," after the removal of the President of the United States to the Federal city in 1800, the pew of Dr. Smith, his former pew, being directly in front of it.<sup>2</sup> He was buried on the same day in the Christ Church grave-yard, at Fifth and Arch streets, near the center of the grounds, just east of the main aisle—grounds made famous by the tomb of Franklin on the one side, and, a little later, Dr. Rush on the other, not to speak of many another great name. On the top marble of the usual rectangular tomb of that day was placed the following inscription:

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<sup>1</sup> Letter of Mrs. Letitia Smith to Dr. Peter Smith, Aldie, Scotland, dated July 6, 1809. De Renne Papers. In his will, made exactly to the day, three years before his death, he showed premonition of both the cause and time of his death. "As I \* \* \* \* may be suddenly called from this state of Being," he says, "especially as I have been at times, in the spring and autumn seasons, for some years past, afflicted with an alarming headache; and altho' I am not so often subject to it since I have resided in the City, as I had been for some years before. Yet being frequently attacked by it violently on the Circuit in spring and autumn, I deem it a duty," etc. The will of Judge Smith is a most able document, and marked by the highest and most tender sentiment, gentle dignity and earnestness. It is also one of his most finished papers. Mrs. Smith died on March 8, 1811, at the age of fifty-two, at Charleston, S. C., and was buried at the side of her husband.

<sup>2</sup> Records of Christ Church.



"Thomas Smith  
 One of the Judges of the Supreme Court  
 of Pennsylvania  
 rests beneath this marble.  
 He sustained various public offices  
 with ability and fidelity.  
 His integrity was inviolable.  
 An affectionate husband and father,  
 In his friendships benevolent and sincere,  
 He conscientiously discharged his public duties  
 until the last day of his life,  
 with unremitting industry and zeal,  
 and died 31<sup>st</sup> March, 1809.  
 Aged 64 years."<sup>1</sup>

On the evening of the 31st the first notice of his death appeared in *The Democratic Press*: "Died.—This morning Thomas Smith, Esq., late one of the Judges of the Supreme Court for the Commonwealth of Pennsylvania." It also appeared in other papers as they were issued, and there seemed to be an understanding that later on something worthy concerning him should be published. When court met after April 4, and Justice Yeates attempted to offer an opinion, he said: "But my mind is not yet satisfied as to the manner of entering judgment on the verdict. The late mournful event has put it out of my power to examine the law, and consult the entries in such cases, as I fully intended; and therefore the cause must be continued under advisement."<sup>2</sup> Later on in the same term, Chief Justice Tilghman, in opening the opinion of the court, said: "In this cause, as in many others, we feel the loss of our brother Smith," and this cause, also, was held under advisement.<sup>3</sup> A little later, in another case, he said: "But although we are without the authority of an adjudged case, we have the opinions of Chief Justice Shippen and Judge Smith, to which I pay great respect, in the case I have mentioned," and the action of the Circuit Court was af-

<sup>1</sup> The lettering had long since become so indistinct that recently, the summer of 1903, in recutting it, the church-yard register copy of it had to be used.

<sup>2</sup> 1 Binney, 574.

<sup>3</sup> *Ibid.*, 600.





CHRIST CHURCH, PHILADELPHIA  
 Showing the Pew occupied by Presidents Washington and Adams,  
 and afterwards by Justice Smith. The Pew is double  
 one with square plate to left of middle aisle



TOMB OF JUSTICE SMITH,  
 in Christ Church Graveyard, Fifth and Arch Streets,  
 Philadelphia



firmed.<sup>1</sup> When Horace Binney issued his first volume of reports, in the preface, written in December, previous to Judge Smith's death, after expressing his gratitude to the Chief Justice, he said: "The reporter at the same time confesses with great sensibility the courtesy of the Judges of the Supreme Court, whose opinions have always been at his service to transcribe, and the notes of one of them, Mr. Justice Smith, have enabled him more than once to supply a chasm, or detect an inaccuracy in his own."<sup>2</sup> When his nephew, Charles Smith, Esq., who was chosen the following year to do the work long since assigned to Justice James Wilson, namely, edit the Laws of Pennsylvania, and wrote that celebrated foot-note of over one hundred and fifty pages, which has ever since been the classic on land law in Pennsylvania, his references to and quotations from the late Justice were frequent and important.<sup>3</sup> Even the late Justice Huston, who pleads to a special admiration for Shippen and Yeates, and himself had confidence in his own authority in the realm of land law, writing, forty years later, on that subject, can find but a single instance in which Judge Smith's knowledge of the Land Office customs, and that, too, before 1769, was at fault, while he gives him a large place in his work on that subject.<sup>4</sup> The best estimate, however, comes from the late Chief Justice Sharswood, who said that Judge Smith "was regarded as having a larger and more accurate knowledge of the land law of the State than any of his associates on the bench."<sup>5</sup>

Something over a month after his death a sketch ap-

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<sup>1</sup> 2 Binney, 100. As chief executor, Mr. Tilghman had charge of Judge Smith's papers, and, as has been indicated, he prized the Judge's notes highly. In 1811, in an opinion, he mentioned possession of the notes: "I find from the manuscript notes of the late Judge Smith, which are in my possession, that it was ruled in the same way," etc. 4 Binney, 59. The executors offered Judge Smith's library for sale on May 15, 1809.

<sup>2</sup> 1 Binney, IV.

<sup>3</sup> 2 Smith's Laws, 105, in edition of 1810.

<sup>4</sup> Huston on Land Titles in Pennsylvania, 1849, pp. 341, 427, 466, et al.

<sup>5</sup> This was said in the presence of Simon Gratz, Esq., of Philadelphia, who, in a letter of October 21, 1902, to the author, says: "What Judge Sharswood said about Judge Smith was, substantially, this: that he was regarded as having a larger & more accurate knowledge of the land law of the State than any of his associates on the bench. Very Truly Yours, Simon Gratz."

peared in the *United States Gazette* of May 11, which his wife, whom he describes in his will as one "who joins the vivacity of youth to the wisdom of age, who is religious without ostentation, cheerful without levity, and grave without morosity," has said was inserted by "one who knew him well." It has been thought that it was written by Chief Justice Tilghman or Editor Bronson, but the manuscript of it—whether copy or original cannot be known—which Mrs. Smith sent to his mother in Scotland, is in the hand of his nephew and executor, Charles Smith. It was evidently her favorite of all that appeared about him; "what is said of him," she adds, "is most just. He spent a useful & active life—no man more industrious, or more studious to acquire useful knowledge & few men had acquired so much. As a Judge he was independent and correct. He was certainly a great public loss, for no man could have been more devoted to the public good, and served his Country with more zeal and ability for upwards of twenty years."<sup>1</sup>

"To record the worth and virtues of departed friends," reads the sketch, "is a grateful though melancholy duty. Among the various biographical sketches which daily meet the eye, there can be few, if any, more deserving of notice and respect than the following affectionate tribute to the memory of the late

#### "JUDGE SMITH.

"This gentleman was a native of North Britain, from whence he emigrated in early life to this continent. On the 9<sup>th</sup> of February, 1769, he was appointed Deputy Surveyor of an extensive frontier district, and established his residence at the town of Bedford. In the execution of his official duties, he displayed integrity and abilities which could not have been exceeded. His fidelity in this important and interesting trust was so strongly marked, that no individual has been able to complain of injury; and exemption from law suits, and certainty of titles to property, have been almost the invariable result. So high was his sense of honor, so inflexible his principles of justice, that he would never suffer even suspicion to cast a shade

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<sup>1</sup> Letter of Mrs. Thomas Smith to Dr. Peter Smith, July 6, 1809.

over his official character. His private interests yielded to the firmness of his mind, and although landed property was then so easily to be acquired, he scrupulously avoided all speculation; determined that the desire of gain should neither warp his rectitude, nor give birth to jealousy in others.

"When the county of Bedford was erected, he received commissions from the then Proprietaries, to execute the offices of Prothonotary, Clerk of the Sessions, Orphans' Courts, and Recorder of Deeds for that County: and such was the uniform tenor of his conduct as to insure the respect, esteem and attachment of all who had any transactions with him.

"At the commencement of the late revolution, he zealously espoused the cause of his adopted country, and at the head of his regiment of militia performed his tour of duties in her service; and his attachment to the Liberties and Independence of these United States was inviolable. By the citizens of his county he was chosen to represent them in the Convention which formed the first constitution of this commonwealth; but, it is just to add, that instrument did not meet his entire approbation. As a member of the Legislature, frequently elected, his talents were useful, his exertions and industry unremitted; and when, towards the close of the revolutionary war, he was appointed to represent this State in Congress, he carried with him into that body the same invaluable qualities, the same firm and inflexible integrity.

"The law was his profession, and he practiced with industry and success; seeking to do justice but abhorring iniquity and oppression; never greedy of gain, he was moderate in receiving the honorable reward of his professional services. He was a father to those who confided in him, however poor or afflicted: he delighted to encourage merit and virtue wherever he found them; but he exposed with severity, violence, fraud and iniquity, whether clothed in rags or shrouded behind the mantles of wealth or influence. To those who sought it, he gave honest and sound advice in questions of Law, according to the best of his skill and judgment: he discouraged law suits and scorned to foment litigation for the sake of gain. He may have frequently erred, more frequently have been de-

ceived by statements imposed upon him by clients, but he never knowingly recommended the prosecution of an unjust cause.

“When the judiciary department, under the present constitution of Pennsylvania, was organized, he was appointed President of the district composed of the counties of Cumberland, Mifflin, Huntingdon, Bedford and Franklin, in which office he continued until, upon the resignation of Mr. Bradford, he was appointed a Judge of the Supreme Court of Pennsylvania. The arduous duties of both those stations he performed with skill and integrity. He spared not himself in sickness or in health—he shrunk from no labour or fatigue. Although his constitution was wearing away, his high sense of duty foreclosed from his view approaching danger, or, tho’ he beheld it, it appeared to him trivial in comparison with what he considered the obligations of conscience. He never tasted the bread of idleness; nor would he have touched the emoluments of office, if unable to perform its duties. But he sunk under this too zealous attention to rigid duty, at an age not greatly advanced; and when, by a little indulgence and self-denial (most surely justifiable) he might yet have been spared to his afflicted family.

“The expressions of his features were apparently austere: his outward manners were not marked with grace or softness. In conversation, his sentiments were delivered with blunt sincerity, and were sometimes supposed, by those who knew him not, to designate the character of harshness, but his heart was replete with the finest qualities which could adorn it—humane, benevolent, and just—in his friendships ardent and sincere, and his acts of friendship executed with peculiar delicacy and grace. In all his dealings he was scrupulously exact, and there exists no man who can truly say he has received from him an injury. Those who knew him well will not hesitate to acknowledge the correctness of this brief eulogium on departed worth.

“To his family his loss is irreparable. As a husband and father he was affectionate, mild, indulgent—the happiness of his family was the great object of his life. Domestic harmony reigned in his household. His mansion was the abode of hospitality. Long, very long, will his loss



be mourned. The memory of his virtues will remain as their sweetest consolation; but the deep felt sorrow of his afflicted widow and children can not recall the husband, father and friend."<sup>1</sup>

For four years past there had been a constant and thorough reorganization of the judiciary system of Pennsylvania to relieve the Supreme Court and meet the needs of a rapidly growing State.<sup>2</sup> Finally, just twenty days before Judge Smith's death, the Circuit Courts were abolished, and the Supreme Court was to hold sessions at Philadelphia, Lancaster, Sunbury, Chambersburg and Pittsburg. With this and other forms of relief, it was deemed that so large a court would not be necessary. In consequence, it was provided that the next vacancy on the Supreme Bench should not be filled, that there should then be but three Justices.<sup>3</sup> Judges Smith and Yeates were of the same age, seniors on the bench, and both were subject to serious attacks of ill health. It was Judge Smith, however, who was the first to go—and, for seventeen years, he had no successor.

Some men there are so strong in moral character and so broadly and soundly appreciative in every situation in life, that, while they may not be men of initiative themselves, are a tower of strength to leaders who are. Such leaders it is, too, who, more than any one else, seem to

<sup>1</sup> From the copy in the handwriting of the late Judge Charles Smith, among the De Renne Papers. This was republished in *The Portfolio*, Vol. II, p. 79, and elsewhere.

<sup>2</sup> The following letters will show that the spirit of reorganization did not cease in 1809. On January 15, 1810, Chief Justice Tilghman wrote, thanking Judge Yeates for news of legislation on the judiciary at Lancaster, which was the capital until 1812. He added: "If they will but let us alone, I shall be satisfied." On October 10, of the same year, Edward Tilghman wrote Yeates: "Can you lay your hands on a sketch I formerly sent you of a scheme for a strong Court of Common Pleas for Philadelphia county to be composed of three law Judges—before whom, or one of them, all suits in that county should be tried, so as to make you of the S. C. a court of error only? If you can, be good enough to send it to me by a good *private* opportunity. If you recollect what you did with it (you having it not) be pleased to say. I am assured that great interest will be made for the adoption of a plan of the sort. I think it must be attended with a raising of the salaries of the Judges of S. C." Whelen Papers.

<sup>3</sup> 5 Smith's Laws, 17. It will be recalled that Judge Bryan was the first "Fourth Judge" under the Commonwealth, so that while it came in with Judge Bryan, it went out with his old antagonist.

understand and need them ; and it is largely through these leaders that they exert their chief influence on their times. Clean, wise, sagacious, and of a constructive spirit, is the man who can take part in the vital movements of a stormy and transitional time and come through it beloved by the best. And after all—are not these our really constructive forces? That it was these elements in Washington which Judge Smith so passionately loved there can scarcely be a doubt ; that these were the ones he wished to possess has been seen in his own words. It is a great thing to be, in all relations of life, merely a just judge.

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